(26,975)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 311.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, AND ROBERT M. THOMPSON, PETITIONERS,

vs.

W. GORDON McCABE, JR., AND WILLIAM F. GRAY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

STEPHEN H. P. PELL and Others, Plaintiffs-Appellants,

against

W. GORDON MCCABE, JR., and Another, Defendants-Appellees.

TRANSCRIPT OF RECORD.

On Appeal from the District Court of the United States for the Southern District of New York.

Myers & Goldsmith, Attorneys for Plaintiffs-Appellants, No. 100 Broadway, Manhattan, N. Y. City.
W. St. John Tozer, Attorney for Defendants-Appellees, No. 42 Broadway, Manhattan, N. Y. City.

United States Circuit Court of Appeals, Second Circuit. Filed Nov. 12, 1918. William Parkin, Clerk.

1 *Citation on Appeal.*

By the Honorable Learned Hand, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to W. Gordon McCabe, Jr., and William F. Gray, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit to be held at the Court Rooms thereof, in the Federal Building, in the Borough of Manhattan, in The City of New York, in the District and Circuit above named, on the 21st day of November, 1918, pursuant to the appeal and order allowing the same, filed in the office of the Clerk of the United States District Court for the Southern District of New York on the 24th day of October, 1918, wherein Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson are appellants and you are appellees, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan in The City of New York in the District and Circuit above named this 24th day of October, 1918, and of the Independence of the United States the 143rd.

LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

2 *Notice of Appeal.*

District Court of the United States for the Southern District of New York.

E 15—222.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

SIRS:

You will please take notice that the plaintiffs hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the decree of the United States District Court for the Southern District of New York, dated the 23rd day of October, 1918, made by Hon. Learned Hand, United States District Judge, dismissing the complaint herein, and from each and every part of the said decree.

Dated, New York, October 24, 1918.

Yours, &c.,

MYERS & GOLDSMITH,
Attorneys for Plaintiffs,
100 *Broadway, Manhattan, City of New York.*

To W. St. John Tozer, Esq., Attorney for Defendants; the Clerk of the United States District Court for the Southern District of New York.

(Endorsed: U. S. District Court. Filed Oct. 24, 1918. S. D. of N. Y.)

3 *Subpœna.*

The President of the United States of America to W. Gordon McCabe, Jr., and William F. Gray, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson, and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty or you and each of you of Two hundred and fifty dollars ($250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 13th day of September, in the year one thou-

sand nine hundred and eighteen and of the Independence of the United States of America the one hundred and forty-third.

ALEX. GILCHRIST, JR.,
Clerk.

MYERS & GOLDSMITH,
Plaintiffs' Sol'rs.

The defendants are required to file their answer or other defense in the above cause in the Clerk's office of this Court on or before the twentieth day after service hereof, excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk.

4 *Bill of Complaint.*

District Court of the United States for the Southern District of New York.

E 15—222. In Equity.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

Complaint.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The plaintiffs above named, by Myers & Goldsmith, their attorneys, complaining of the defendants above named, allege, upon information and belief:

1. The plaintiff, Stephen H. P. Pell, resides at Ticonderoga, in the County of Essex, State of New York.

The plaintiff, Charles A. Kittle, resides at No. 1138 Dean Street, Borough of Brooklyn, City of New York and State of New York.

The plaintiff, Howland H. Pell, resides at the City of New York, in the County of New York and State of New York.

5 The plaintiff, Robert M. Thompson, resides at Southampton, in the County of Suffolk, State of New York.

The plaintiffs prior to July 31, 1914, composed the firm of S. H. P. Pell & Co., a limited partnership formed and organized under the laws of the State of New York, and of which firm Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid were general partners, and Robert M. Thompson aforesaid was the special or limited partner of said firm of S. H. P. Pell & Co.

2. Upon information and belief, that the defendant, William F. Gray, resides in the City of Charleston, State of South Carolina, and in the Eastern District of South Carolina.

Upon information and belief, that the defendant, W. Gordon McCabe, Jr., resides in the City of Charleston, State of South Carolina, and in the Eastern District of South Carolina.

That said defendants are engaged in business as cotton brokers and are members of the New York Cotton Exchange, under the firm name and style of W. Gordon McCabe & Co., and transact business at No. 60 Beaver Street, in the City of New York, within the Southern District of New York.

3. That at divers times prior to about December 23, 1913, the defendants employed S. H. P. Pell & Co., as brokers and members of the New York Cotton Exchange, to purchase certain quantities of cotton for future delivery on the New York Cotton Exchange, and said S. H. P. Pell & Co. made such purchases pursuant to such employment, and thereafter and on or about the 22nd and 23rd days of December, 1913, pursuant to the defendants' directions, S. H.
6 P. Pell & Co. sold said cotton so purchased and the difference between the amounts paid in the purchases and commission therefor and the amount realized upon the sale thereof was the sum of $114,457.67 which the said defendants promised and agreed to pay.

4. That on or about the 23rd day of December, 1913, S. H. P. Pell & Co. rendered to the said defendants an account of the said dealings and transactions between the said defendants, S. H. P. Pell & Co., stating the amount of $114,457.67 as the balance due and owing from the said defendants to the said firm of S. H. P. Pell & Co. and said defendants accepted and retained said account without making any objection thereto, and thereafter the defendants paid the sum of $22,691.53 on account of said indebtedness, leaving due and owing to said S. H. P. Pell & Co. on January 15, 1914, a balance of $91,566.14.

5. That on the 3rd day of August, 1914, pursuant to the Acts of Congress of the United States providing for bankruptcy proceedings, a certain petition in due form by creditors having provable claims, praying for the involuntary adjudication of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, individually and as partners doing business under the firm name of S. H. P. Pell & Co., was duly presented to the District Court of the United States for the Southern District of New York, having jurisdiction thereof, and on said date said petition was duly filed in the office of the Clerk of the District Court of the United States for the Southern District of New York.

6. That a certain petition praying for the appointment of receivers in bankruptcy of Stephen H. P. Pell, Charles A. Kittle
7 and Howland H. Pell, individually and as partners doing business under the firm name of S. H. P. Pell & Co., bankrupts, was also duly presented to said United States District Court in bankruptcy, having jurisdiction thereof, on the 3rd day of August, 1914, and thereupon an order was duly entered in the said United States District Court for the Southern District of New York in said bankruptcy proceedings appointing Theodore H. Price, Arthur R. Marsh and Joseph M. Hatfield as receivers of the said firm of S. H. P. Pell & Co., and of the individual members thereof, said alleged bank-

rupts, and that said receivers duly qualified and entered upon the performance and discharge of the duties of their office as such receivers.

7. That said receivers entered upon the discharge of the duties of their office as aforesaid and in the performance thereof took possession of a large amount of securities and stocks, which were the property of the plaintiff, Robert M. Thompson, and in which property it was alleged that the said receivers and the bankrupt estate had no interest therein and had no claim or title thereto.

8. That on the 23rd day of November, 1914, a petition made by Logan and Bryan, and thereafter and on or about the 28th day of November, 1914, a petition made by Nathaniel H. Morrison and others, creditors of and having provable claims against the firm of S. H. P. Pell & Co., were duly presented to the United States District Court for the Southern District of New York, having jurisdiction thereof, in the said bankruptcy proceeding against the said S. H. P. Pell & Co., aforesaid, and the individuals aforesaid, to wit:
8 Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, alleging that the said Robert M. Thompson (one of the plaintiffs herein), was a member of and a general partner in the firm of S. H. P. Pell & Co., and liable for the payment of the debts of said firm of S. H. P. Pell & Co., and prayed and demanded that the said Robert M. Thompson be made a party defendant to the said bankruptcy proceeding; that the firm of S. H. P. Pell & Co. be adjudged to be composed of Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson as general partners and adjudicated involuntary bankrupts, and that the Clerk of the Court be directed to issue a subpœna directed to the said Robert M. Thompson as one of the alleged bankrupts in the proceeding, and that such other and further proceedings should be had as should be proper to have the said Robert M. Thompson adjudicated an involuntary bankrupt individually and as a general partner and a member of the said firm of said S. H. P. Pell & Co.

That copies of the said petitions and of the said subpœna and the papers upon which it issued are hereunto annexed and made a part hereof and are marked respectively Exhibits 1, 2 and 3.

9. Upon information and belief that the receivers aforesaid in the course of their administration of the estate of S. H. P. Pell & Co., in bankruptcy, acting for and in behalf of the bankrupt estate, on or about the 19th day of October, 1914, gave notice to the defendants that the firm of S. H. P. Pell & Co. was in bankruptcy and of their appointment as receivers, and as such receivers demanded payment of a claim due from said defendants to the bankrupt estate amounting to the sum of $261.52, and also on or about the 19th day
9 of October, 1914, demanded payment of a claim due from the said defendants, to the bankrupt estate, amounting to the sum of $91,467.57, and which latter claim is the same cause of action mentioned in paragraphs 3 and 4 of this complaint and said defendants kept and retained said statements without making objection thereto, and on or about the 21st day of November, 1914, the said defendants paid the aforesaid sum of $261.52 to the said receivers.

10. Plaintiffs further allege upon information and belief that the defendants above named had full and complete knowledge and notice of the maintenance and disposition of the said bankruptcy proceedings and the orders and decrees therein made, from about the time of the inception thereof down to and including the final disposition thereof.

11. That thereafter and on the 25th day of November, 1914, an order of adjudication was duly made by the said United States District Court and entered in the said bankruptcy proceedings against the said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, bankrupts, individually and as members of the firm of S. H. P. Pell & Co., adjudicating said firm of S. H. P. Pell & Co. and said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, individual members of said firm, to be involuntary bankrupts.

A copy of said order of adjudication is hereunto annexed and made a part hereof and is marked Exhibit 4.

12. That divers and various negotiations were had between the creditors of said firm of S. H. P. Pell & Co., bankrupts aforesaid, the receivers, and the said Robert M. Thompson for an adjust-
10 ment and settlement of the claims of the creditors of said firm of S. H. P. Pell & Co., and for a composition in bankruptcy and for the dismissal of the said several petitions against the said Robert M. Thompson, the withdrawal of the claim for $3,373,082.30 made in said bankruptcy proceedings against said S. H. P. Pell & Co. by said Robert M. Thompson, and the return of certain securities to and the release and discharge of the said Robert M. Thompson and of the said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell individually and as copartners of the said firm of S. H. P. Pell & Co., and from all liability to the creditors.

13. That on or about the 2nd day of October, 1914, the said bankrupts duly filed their schedules in said bankruptcy proceedings, and therein set forth that the said bankrupts individually and the firm of S. H. P. Pell & Co. were indebted to the said Robert M. Thompson in the sum of $3,373,082.30, and in said schedules further set forth that the defendants were indebted to the said firm of S. H. P. Pell & Co. in the sum of $261.52.

A copy of the statement of said claim of said Robert M. Thompson as stated in said schedules is hereto annexed and made a part hereof and is marked Exhibit 5.

That in pursuance of said negotiations and agreement the said bankrupts, to wit, Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, and said firm of S. H. P. Pell & Co. on or about the 21st day of December, 1914, pursuant to the provisions of the Bankruptcy Act in such case made and provided, duly proposed and submitted an offer of composition to their creditors, including the creditors of said firm of S. H. P. Pell & Co.

A copy of the said offer of composition is hereto annexed and made a part hereof and is marked Exhibit 6.

11 14. That in pursuance of said negotiations and agreement of settlement and composition aforesaid, the said receivers made and duly presented to the said United States District Court

their certain petition dated January 6, 1915, together with certain other papers, and an order was thereupon duly made by the said United States District Court in the said bankruptcy proceeding on the 6th day of January, 1915.

That copies of said petition and papers presented therewith and order are hereunto annexed and made a part hereof and are marked respectively Exhibits 7 and 8.

15. That thereafter the said plaintiff, Robert M. Thompson, duly carried out and performed all the terms and conditions of the agreement and understanding referred to in the said order of January 6, 1915, and the petition upon which it was granted (Exhibits 7 and 8).

16. That thereafter such further proceedings in the said matter of S. H. P. Pell & Co. in bankruptcy aforesaid, were duly had in the said United States District Court for the Southern District of New York that on the 25th day of January, 1915, an order confirming the terms of the said offer of composition was duly made and entered in the said United States District Court for the Southern District of New York.

A copy of said order of confirmation is hereunto annexed and made a part hereof and is marked Exhibit 9.

17. That on the 25th day of January, 1915, John W. Jay named in the said offer of composition (Exhibit 6) and the order of confirmation (Exhibit 9), accepted the terms of the agreement
12 and entered upon the performance of the trust thereby created and continued to discharge the same until April 13, 1915.

18. That thereafter and on the 5th day of February, 1915, the said receivers, pursuant to the provisions of the said order of confirmation and in performance of the offer of composition, and after the acceptance of the said trust by the said John W. Jay as trustee aforesaid, duly made and executed under their hands and seals their deed or instrument of transfer as receivers aforesaid, wherein and whereby it was, among other things, provided that the said receivers "do by these presents convey and assign unto said John W. Jay all of the assets and property of said S. H. P. Pell & Company and of said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell individually and as co-partners doing business under the firm name and style of S. H. P. Pell & Company. * * *

"To have and to hold the same unto said John W. Jay, his heirs and assigns forever."

19. That thereafter and on the 6th day of March, 1915, pursuant to said offer of composition and order of confirmation, made and entered as aforesaid, and in the due performance thereof, the said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, individually and as partners, doing business under the firm name of S. H. P. Pell & Co., bankrupts, duly executed their deed or other instrument of transfer under their hands and seals, wherein and whereby they duly conveyed to the said John W. Jay "all of the assets and property of said S. H. P. Pell & Company and of said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell,
13 individually and as co-partners doing business under the firm name and style of S. H. P. Pell & Company."

20. That the said offer of composition as confirmed and the order of confirmation entered aforesaid was duly and fully completed, performed and carried out by the said bankrupts and by the said Robert M. Thompson.

21. Upon information and belief that by virtue of the provisions of said order of confirmation of January 25, 1915 (Exhibit 9), and of the said Bankruptcy Act and the several amendments thereto in force on the 25th day of January, 1915, and in force and effect on the 12th day of March 1915, and of the final acts in full performance of the terms of the said composition which were duly and completely carried out and performed by the bankrupts, that the bankruptcy proceedings then terminated, and the said bankrupts and the said Robert M. Thompson were released and discharged from all liability for the debts of and all provable claims against the firm of S. H. P. Pell & Co. and the creditors of said S. H. P. Pell & Co. were forever barred by the provisions of the offer of composition (Exhibit 6) and the order of confirmation aforesaid (Exhibit 9), and of the Bankruptcy Act aforesaid, and the said firm of S. H. P. Pell & Co. and said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, general partners thereof, and Robert M. Thompson, as special partner aforesaid or otherwise, were as partners and individually released and discharged from any further liability to the creditors of the said firm, including the defendants, who thereupon ceased to have any further claim, demand or cause of action against the said firm of S. H. P. Pell & Co. and the individual members aforesaid and said Robert M. Thompson, of, from and upon all claims provable in bankruptcy.

14 22. Upon information and belief, that on the 13th day of April, 1915, the said John W. Jay duly resigned the trust aforesaid and thereupon the Guaranty Trust Company of New York was duly appointed substituted trustee in the place and stead of the said John W. Jay, and the said Guaranty Trust Company of New York accepted said trust and entered upon and now continues in the performance of the said trust, and thereafter and on the 13th day of April, 1915, the said John W. Jay, as such trustee, duly executed his deed or other instrument of conveyance as trustee, conveying and transferring to the Guaranty Trust Company of New York, which accepted the said trust, all of the remaining estate of the bankrupts individually and as co-partners, which transfer included, among other things, the following claims, demands and causes of action:

1. A claim, demand and cause of action in favor of S. H. P. Pell & Co., and against the defendants, W. Gordon McCabe, Jr., and William F. Gray, as co-partners, and being the cause of action set forth in paragraphs 3 and 4 of this complaint.

2. A claim, demand and cause of action in favor of and belonging to W. R. Craig & Co. against the defendants, W. Gordon McCabe, Jr., and William F. Gray, as co-partners, for the sum of $10,868.00, which was by the said W. R. Craig & Co. assigned and transferred to S. H. P. Pell & Co. on or about February 3, 1914.

3. A claim, demand and cause of action in favor of and belonging to E. & C. Randolph against the defendants, W. Gordon McCabe, Jr.,

and William F. Gray, as co-partners, for the sum of $30,894.02,
which was by the said E. & C. Randolph assigned and trans-
15 ferred to S. H. P. Pell & Co. on or about February 3, 1914.

That on or about the 13th day of April, 1915, Stephen H. P. Pell, Charles A. Kittle and Robert M. Thompson of the plaintiffs herein purchased and acquired the interests of the several creditors of S. H. P. Pell & Co. aggregating the sum of $2,249,174.20, mentioned in Schedule "C" of said Exhibit 6 herein, and are now the owners and holders of said interests.

23. That on or about the 14th day of June, 1916, an action was brought in the Supreme Court of the State of New York, laying the venue in New York County, by the Guaranty Trust Company of New York as substituted trustee aforesaid, as plaintiff, against W. Gordon McCabe, Jr., and William F. Gray as defendants therein, and being the defendants in this action, to recover the aforesaid sum of $91,566.14 (among other claims), and which action was thereafter removed by the defendants to the United States District Court for the Southern District of New York, and was thereafter by the Federal Court duly remanded to the State Court, wherein the said action is now pending.

That the said defendants in their answer in said action last mentioned interposed and served on or about the 3rd day of January, 1917, among other things, for a defense set up and alleged in respect to the cause of action set forth in paragraphs 3 and 4 of this complaint, the following defensive matter, viz.:

"That at various times prior to the first day of January, 1914, the defendants had employed S. H. P. Pell & Co. as brokers to purchase certain quantities of cotton for future delivery on the New York Cotton Exchange; that during said period said S. H. P. Pell & Co. rendered to defendants various statements of account wherein
16 said defendants were charged with the purchase price of about 77,700 bales of cotton in the amount of approximately $15,-174,825, which cotton according to said statements of account had been purchased by S. H. P. Pell & Co. for defendants and the purchase price whereof as aforesaid had according to said statements of account been paid, laid out and expended by said S. H. P. Pell & Co.; that defendants relied on said statements and until some time after the commencement of this action supposed them to be true and correct.

"Relying on the truth and correctness of said statements as aforesaid, defendants had prior to the first day of January, 1914, paid to said S. H. P. Pell & Co. large sums of money, aggregating several hundred thousand dollars, and had subsequently but prior to said January 1, 1914, received a statement of account from said S. H. P. Pell & Co. showing a balance due to said S. H. P. Pell & Co. on account of said alleged purchases (and after allowing for said payments made by defendants) in the sum of $114,457.67.

"On information and belief that large amounts of said alleged purchases of cotton were not in truth or in fact made by said S. H. P. Pell & Co., and the sums of money charged in said statements of account representing the said alleged purchases as aforesaid were not

in truth or in fact paid, laid out or expended by said S. H. P. Pell & Co., that all the facts in this paragraph alleged were at all times within the knowledge of said S. H. P. Pell & Co., but were not within the knowledge of the defendants or either of them until after the commencement of this action.

"On information and belief that the amounts erroneously charged the defendants in said statements of account rendered by said
17 S. H. P. Pell & Co., as aforesaid, greatly exceeded the sum of $115,000, so that a proper, just and true account and statement of account between the defendants and said S. H. P. Pell & Co. had immediately prior to the first day of January, 1914, would have shown that the defendants were not at that time in any way indebted to said S. H. P. Pell & Co., but on the contrary would have shown that said S. H. P. Pell & Co. were at that time largely indebted to defendants.

"That said statements of account so rendered by S. H. P. Pell & Co. are statements and accounts mentioned in the complaint herein and related to and included accounts of the alleged transactions and payments alleged in said complaint to have been made by S. H. P. Pell & Co., for account of defendants."

24. That on or about the 29th day of March, 1917, another and further action was brought in the Supreme Court of the State of New York, laying the venue in New York County, by the Guaranty Trust Company of New York, as substituted trustee aforesaid, as plaintiff, against W. Gordon McCabe, Jr., and William F. Gray, as defendants, therein (and being the defendants herein), upon the said two causes of action which originally accrued in favor of W. R. Craig & Co. and E. & C. Randolph, for the aggregate sum of $41,762.02, and which action was thereafter removed by the defendants therein to the United States District Court for the Southern District of New York, but was thereafter by the Federal Court duly remanded to the State Court, wherein the said action is now pending.

That the said defendants in their answer interposed on or about the 4th day of October, 1917, in the last mentioned action brought by the Guaranty Trust Company of New York, as plaintiff,
18 as the transferee or assignee of the above mentioned claims of W. R. Craig & Co. and E. & C. Randolph, stated, among other things, an alleged defense and also a counterclaim against the said assigned causes of action arising and growing out of the transactions set forth in paragraphs 3, 4 and 23 of this complaint, viz.:

"For a counterclaim alleges:

"That during the months of November and December, 1913, and January, 1914, defendants paid to S. H. P. Pell & Co. various sums of money aggregating over $390,000; on information and belief that all of said sums were paid by defendants to S. H. P. Pell & Co. for the use of defendants and that no part of said sums or any of them has been repaid to defendants or for their use."

25. Plaintiffs, upon information and belief, further allege that any claim or demand which the defendants had or have against them, or either of them, was provable in the said bankruptcy proceedings, and the defendants falsely and fictitiously pretend and assert that the

said offer of composition (Exhibit 6), and the order of confirmation thereof (Exhibit 9), and of the Bankruptcy Courts (Exhibit 8), and the performance and completion thereof by the plaintiffs as aforesaid, were insufficient in law to release and discharge the alleged indebtedness and claim which the defendants had or claim to have had against the said firm of S. H. P. Pell & Co. and the said individual members, viz., Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, and the said Robert M. Thompson, as special partner or otherwise, as aforesaid, arising out of the transactions aforesaid, which the defendants had with the firm of S. H. P. Pell & Co. prior to the 25th day of January, 1915.

19 26. Plaintiffs further allege upon information and belief that the said defendants on or about the 25th day of March, 1918, commenced and instituted an action or suit in the Court of Common Pleas, in the State of South Carolina, County of Charleston, against the plaintiffs, alleging and claiming that the plaintiffs were general partners, constituting the firm of S. H. P. Pell & Co. aforesaid, and therein demand judgment for and seek to recover the sum of $1,500,000, based upon and growing out of the dealings and transactions set forth in paragraphs numbered 3, 4 and 23 of this complaint.

That hereunto annexed and made a part hereof are copies of the summons and complaint in the said action brought by the said defendants, as plaintiffs, W. Gordon McCabe, Jr., and William F. Gray, against the said plaintiffs, as defendants, containing the grounds of the alleged and pretended cause of action, and which are hereby made a part hereof and are marked respectively Exhibits 10 and 11.

Plaintiffs allege upon information and belief that the defendants herein and in the actions referred to in paragraphs 23 and 24 of this complaint had notice and knowledge of all the material facts set forth in the complaint (Exhibit 11) at the time the answers referred to in said paragraphs 23 and 24 were interposed by and on behalf of the defendants in said actions.

27. Plaintiffs further allege, upon information and belief, that the said suit or action in the Court of Common Pleas aforesaid, was instigated, devised, designed and brought, with the intention and design of questioning, challenging and attacking in, by and through the State courts of South Carolina the power and jurisdiction

20 of the United States District Court for the Southern District of New York to entertain the offer of composition (Exhibit 6), to make and enter the said order of confirmation (Exhibit 9), and to make and enter the order of January 6 (Exhibit 8), aforesaid, and the provisions and effect thereof, and with the malicious intention and design of vexing, harassing and annoying the said plaintiffs by and with aforesaid suit and action.

That the purpose of said action so brought and commenced in said Court of Common Pleas brought as aforesaid is to needlessly and uselessly vex, annoy and harass the plaintiffs and to put and subject them to great and unnecessary expense and to require them to attend and defend the action in the State of South Carolina, remote and distant from their several places of occupation and residence and

of the place of residence and occupation of the witnesses who will be necessarily required to testify in said action, at a great and useless waste of time and injury and damage to their business occupation.

28. That the said action so brought by the defendants as plaintiffs therein, in the Court of Common Pleas aforesaid, as said plaintiffs are advised and verily believe, depends upon the same state of facts brought out and proven in the bankruptcy proceedings in part and which as to any other facts connected with and forming part of any transaction of the defendants herein (and plaintiffs therein) with S. H. P. Pell & Co., could have been proven in the bankruptcy proceedings, and any and all questions of fact and law which could be raised and urged in the said Court of Common Pleas could have been raised, urged and maintained in the United States District Court in the aforesaid bankruptcy proceedings.

21 29. That the principal and conclusive question involved in the said action so brought in the Court of Common Pleas, as said plaintiffs are advised and verily believe, is the extent and effect of the offer of composition (Exhibit 6), the order or decree of confirmation, dated January 25, 1915 (Exhibit 9), and the order of January 6 (Exhibit 8) and the operation of the Bankruptcy Act releasing and discharging the plaintiffs of, from and upon any claims provable against and debts of the firm of S. H. P. Pell & Co. due to their creditors, including the defendants, and the alleged liability and debt set forth in the complaint (Exhibit 11) in the said action in the Court of Common Pleas.

That the real and actual purpose and design of said action so brought in said Court of Common Pleas is to assail and attack the validity and sufficiency of the proceedings and orders and decree of the United States District Court for the Southern District of New York in bankruptcy in the matter of S. H. P. Pell & Co., and the power and jurisdiction of that court in the premises.

That thereafter and prior to the commencement of this suit the said Robert M. Thompson, one of the plaintiffs herein, and the only defendant therein who was served with process, entered a special and limited appearance in said State Court and objected to the jurisdiction thereof and duly caused proceedings to be taken and had the said action removed from the State Court, to wit: the Court of Common Pleas, into the District Court of the United States for the Eastern District of South Carolina, wherein the said action is now duly pending for the determination thereof.

The said action pending in the South Carolina Court exposes the plaintiffs to a judgment of a Court other than the Court which 22 rendered said orders and decree, as to their effect and extent, and disturbs the plaintiffs in the possession of their rights, possession and release awarded and secured by the orders and decree (Exhibits 8 and 9), and will by the judgment of the Court in said action expose and subject the plaintiffs to a liability from which they have been released and discharged as aforesaid.

30. That upon information and belief, other persons dealing with said S. H. P. Pell & Co. and who, by reason of similar alleged claims, may have had provable claims against said firm of S. H. P. Pell & Co., and many of whom appeared and proved their claims in said

bankruptcy proceedings, have threatened and intend to bring similar vexatious and harassing suits and actions against the plaintiffs in jurisdictions distant from New York, upon similar grounds and upon claims which were provable in said bankruptcy proceedings, and the plaintiffs have reason to believe and apprehend that these threats may and will be carried into execution and that the plaintiffs will be put to great and useless expense and suffer and be subjected to great annoyance and inconvenience in preparing for and attending to such suits and actions which may be brought in the courts of distant States.

31. The plaintiffs allege it is impossible and impracticable to make all the creditors of said firm of S. H. P. Pell & Co. parties to this action, but the plaintiffs offer to make and admit as additional parties defendant all persons claiming to be creditors of said S. H. P. Pell & Co. as may desire to come into this suit and be heard.

31. The plaintiffs have no adequate remedy at law and can
23 have no adequate relief except in this Honorable Court for the enforcement and execution of the orders, judgments and decrees of this Court, in the bankruptcy administration, and to the end that the defendants may, if they can, show why plaintiffs should not have the relief hereby prayed for, plaintiffs file this bill of complaint and pray that defendants may make a full disclosure and discovery of all the matters aforesaid according to the best of their knowledge, information and belief, and make true, full and direct answers to the matters hereinbefore stated, charged and alleged, but not under oath, and that an answer by the defendants under oath is hereby waived.

Wherefore, plaintiffs pray, may it please your Honors, to grant to plaintiffs writ or writs of injunction, conformable to the prayer of this complaint, and an ad interim restraining order, and also that a writ of subpœna issue out of and under the seal of this Court directed to said defendants, commanding them and each of them on a day certain to appear and answer under this bill of complaint, and to abide by and perform the orders and decrees of this Court in the premises.

Wherefore, plaintiffs pray the judgment and decree of this Honorable Court against the defendants:

1. Perpetually enjoining and restraining the defendants from taking any further and other steps or proceedings in the certain action brought in the Court of Common Pleas for the State of South Carolina, and removed as aforesaid, wherein the defendants herein are plaintiffs therein, and the plaintiffs herein are defendants therein, which shall proceed on the ground that Robert M. Thompson is liable as a general partner of S. H P. Pell & Co. or otherwise, in respect to any claim which was provable in the bankruptcy proceedings aforesaid.

24 2. Perpetually enjoining the defendants from maintaining and continuing the present action brought in said Court of Common Pleas, and removed as aforesaid, and from instituting and commencing any other and further action, suits or proceedings against the plaintiffs herein as defendants therein based, founded or predicated upon the transactions set forth in the complaint (Exhibit 11) in the action in the Court of Common Pleas and removed as aforesaid and set forth in the complaint herein upon any ground in

respect to the matters set forth in paragraphs 3, 4 and 23 of this complaint.

3. Perpetually enjoining and restraining the defendants from attacking, questioning or challenging the power and jurisdiction of the District Court of the United States for the Southern District of New York, in bankruptcy to make and enter and the effect and extent of the orders and decrees aforesaid, excepting by and through appropriate proceedings in the said Bankruptcy Court, or by and through appropriate actions or suits in the United States District Court for the Southern District of New York.

4. And that the plaintiffs may have such ad interim or provisional orders enjoining and restraining the defendants as may be proper until the final judgment or decree, and for such other and further order, judgment or decree as may be just and proper in the premises.

MYERS & GOLDSMITH,
Attorneys for the Plaintiffs,
100 *Broadway, New York City.*

EMANUEL J. MYERS.
Of Counsel.

25 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Charles A. Kittle, being duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

CHARLES A. KITTLE.

Subscribed and sworn to before me this 15th day of August, 1918.

CECILIE ULLMAN,
Notary Public, Residing in New York County.
N. Y. Co. Clerk's No. 3; *Reg. No.* 9003.

26 EXHIBIT 1.

Petition of Logan & Bryan to Have Robert M. Thompson Adjudicated an Involuntary Bankrupt, etc.

United States District Court for the Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Partners Doing Business under the Firm-name of S. H. P. Pell & Co., Alleged Bankrupts.

SIRS:

Take notice that upon the annexed petition of Logan & Bryan dated November 23, 1914 and the annexed affidavit of John G. Lonsdale verified November 23, 1914 and upon a written copy of the statements made by Robert M. Thompson before Peter B. Olney as Special Master in the above entitled proceedings and upon the petition in bankruptcy herein, the undersigned will make a motion at a term of this Court for the hearing of motions to be held at the U. S. Court House in the Post Office building in the Borough of Manhattan, City, County and State of New York on the 30 day of November, 1914 at 10.30 o'clock a. m. or as soon thereafter
27 as counsel can be heard for the relief demanded in the annexed petition.

Dated N. Y. November 23, 1914.

Yours, etc.,

WOLLMAN & WOLLMAN,
Attorneys for Logan & Bryan.

O. & P. O. Address, 20 Broad St., Borough of Manhattan, New York City.

To

Charles Pope Caldwell, Esq., Attorney for Bankrupts.

David H. Miller, Esq., Attorney for petitioning and other creditors.

Nicholl, Anable, Lindsay & Fuller, Esqs., Attorneys for Robert M. Thompson.

Stover & Hall, Esqs., Attorneys for W. R. Craig & Co.

Hawkins, Delafield & Longfellow, Esq-., Attorneys for Gwathmey & Company.

John V. Judge, Esq., Attorney for Peter A. Franklin, Jr.

28 United States District Court for the Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Partners Doing Business under the Firm-name of S. H. P. Pell & Co., Alleged Bankrupts.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The petition of Logan & Bryan respectfully shows and alleges:

I. That at all the times hereinafter mentioned Logan & Bryan was and still is a copartnership composed of Benjamin B. Bryan, John G. Lonsdale, Stuart Logan, Howard H. Logan and Frank C. Hollinger and that said firm of Logan & Bryan was on July 31, 1914, and ever since has been a creditor of S. H. P. Pell & Co. a copartnership composed of Stephen H. P. Pell, Howland Haggerty Pell, Charles A. Kittle and Robert M. Thompson to the extent of over $30,000 and that said Logan & Bryan appear in the schedule of creditors heretofore filed herein by S. H. P. Pell & Co. as a creditor of said firm of S. H. P. Pell & Co.

29 Second. That heretofore certain creditors of said S. H. P. Pell & Co. filed an involuntary petition in bankruptcy in this Court in the above entitled proceeding against Stephen H. P. Pell, Howland Haggerty Pell and Charles A. Kittle individually and as partners doing business under the name of S. H. P. Pell & Co. That Robert M. Thompson is and on July 31, 1914 and prior to the filing of said petition in bankruptcy was and ever since then has been a general partner in said firm of S. H. P. Pell & Co. and a necessary and indispensable party to these proceedings but that said Robert M. Thompson was not made a party to these bankruptcy proceedings against the partnership of S. H. P. Pell & Co.

Third. That the acts of bankruptcy of said firm are set forth in the petition in bankruptcy of the petitioning creditors hereinabove referred to.

Fourth. That receivers have been appointed in this proceeding who have taken and now have possession of the copartnership assets of the firm of S. H. P. Pell & Co. which are worth over $1,000,000.

Fifth. That the assets of said firm and of the individual members thereof, except said Thompson at the time of the beginning of these proceedings were not and are not worth and will not realize within $1,000,000 of enough to pay the liabilities of said firm exclusive of any claim that said Robert M. Thompson makes against said firm.

Sixth. That said Robert M. Thompson stated upon his examination which took place in these bankruptcy proceedings that he did not have property and assets over and above all his debts and
30 liabilities to the extent of $800,000 and therefore your petitioner states the assets of the firm and of the individual mem-

bers thereof including the assets of said Thompson are not sufficient to pay the liabilities of said S. H. P. Pell & Co. in full.

Wherefore said Logan & Bryan pray that said Robert M. Thompson be made a party defendant to this proceeding and that the Clerk of the Court be directed to issue a subpœna to be served upon said Thompson as one of the alleged bankrupts in this proceeding and that the title of this proceeding be amended accordingly and that proper proceedings be taken herein to have said Robert M. Thompson as well as all the other members of said firm of S. H. P. Pell & Co. and said firm adjudicated bankrupts and for such other and further relief as may be proper in the premises.

Dated N. Y. November 23, 1914.

WOLLMAN & WOLLMAN,
Attorneys for Logan & Bryan.

31 United States District Court for the Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Partners Doing Business under the Firm-name of S. H. P. Pell & Co., Alleged Bankrupts.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, County of New York, ss:

John G. Lonsdale being duly sworn says: I am a member of the firm of Logan & Bryan composed of Benjamin B. Bryan, John G. Lonsdale, Stuart Logan, Howard H. Logan and Frank C. Hollinger. I have read the foregoing petition and all the statements made therein are true as I verily believe.

Of my own knowledge, I know that said Logan & Bryan is a creditor of S. H. P. Pell & Co. to the extent of more than $30,000 and that a petition in bankruptcy was filed herein against said S. H. P. Pell & Co. as set forth in the foregoing petition and that Robert M. Thompson made the statements which it is alleged in the foregoing petition of Logan & Bryan that he made.

32 The source of my information and the grounds of my belief that Robert M. Thompson is a general partner in said firm are statements which I heard said Robert M. Thompson make on his examination which took place in the above entitled proceedings, which statements are set forth in the transcript of the testimony of said Thompson which will be filed on this motion and inspection of the various contracts and documents produced on said examination.

The sources of my information and the grounds of my belief as to the assets of said firm of S. H. P. Pell & Co. are statements I heard one of the receivers make under oath, a circular gotten up by the receivers and by S. H. Pell & Co. and my knowledge gained since

the bankruptcy proceedings of the general nature and extent of the assets and liabilities of S. H. P. Pell & Co.

JOHN G. LONSDALE.

Sworn to before me this 23rd day of November, 1914.
[SEAL.] SAMUEL M. MURPHY,
Notary Public, No. 2514, *New York Co.*

33 EXHIBIT 2.

Petition of Morrison and Others to Have Robert M. Thompson Adjudicated an Involuntary Bankrupt, etc.

District Court of the United States, Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Partners Doing Business under the Firm-name of S. H. P. Pell & Co., Alleged Bankrupts.

Upon the affidavit of David H. Miller, verified the 28th day of November, 1914, upon the petition in bankruptcy filed herein on the 3d day of August, 1914, upon the petition of the intervening petitioning creditors, Nathaniel H. Morrison, Gayle L. Young and Heineken & Vogelsang, filed herein on the 28th day of November, 1914, and upon all other proceedings had herein, let the petitioning creditors herein, the alleged bankrupts herein, Robert M. Thompson, Logan & Bryan, W. R. Craig & Co., H. Hentz & Co., Gwathmey & Co., Peter A. Franklin, Jr. and Thompson & McKinnon, show cause before me or one of the Judges of the United States District Court for the Southern District of New York, at a Term of this
34 Court, to be held at the United States Court House, in the Post Office Building, in the Borough of Manhattan, City, County and State of New York, on the 30th day of November, 1914, at 10.30 o'clock in the forenoon thereof, or as soon thereafter as counsel can be heard, why the relief prayed for in the said petition of Nathaniel H. Morrison, Gayle L. Young and Heineken & Vogelsang, intervening petitioning creditors herein should not be granted, and why said intervening petitioning creditors should not have such other and further relief as may be just and proper.

Due cause appearing therefor, let service of a copy of this order and of the affidavit of David H. Miller, verified the 28th day of November, 1914, upon which it is granted, on the 28th day of November, 1914, be deemed due timely and sufficient service thereof.

Dated, New York, November 28, 1914.

AUGUSTUS N. HAND,
District Judge.

35 United States District Court for the Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Partners Doing Business under the Firm-name of S. H. P. Pell & Co., Alleged Bankrupts.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Your petitioners Nathaniel H. Morison, Gayle L. Young and Heineken & Vogelsang hereby respectfully show to this Court and allege:

First. That heretofore and on the 3rd day of August 1914, a petition in bankruptcy was herein filed alleging that Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell then were and had been partners doing business under the firm name and style of S. H. P. Pell & Company, and praying that Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid as individuals and the *the* firm of S. H. P. Pell & Co. be adjudged bankrupt within the purview
36 of the Acts of Congress relating to bankruptcy of which said petition in bankruptcy a copy is hereto annexed for greater particularity and that said petition was with a subpœna duly served, and that this Honorable Court duly obtained jurisdiction of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid, individually and of the firm of S. H. P. Pell & Co., and that no answer has been filed to said petition and no decree of adjudication in bankruptcy has been herein entered.

Second. Upon information and belief that on the said 3rd day of August, 1914, and for greater portion of the six months next prior thereto, the firm of S. H. P. Pell & Co. was and had been a copartnership composed of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid, and of Robert M. Thompson, and that the said Robert M. Thompson at all the said times was and had been a general partner in and of the said firm of S. H. P. Pell & Co. together with Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid, and that the said Robert M. Thompson was not at any of the said times and is not now a wage earner or a person engaged principally in farming or in the tillage of the soil.

Third. That the nature and amount of your petitioners' claims are as follows:

1. Claim of Nathaniel H. Morrison: That on the 31st day of July, 1914, and at all times prior thereto hereinafter mentioned, your petitioner was and now still is a member of the New York Cotton Exchange, a corporation duly organized under the laws of New York.

That at sundry times during the month of July 1914 and
37 prior to the 31st day thereof your petitioner at the special instance and request of the firm of S. H. P. Pell & Co. performed and rendered certain services for and to the said firm of

S. H. P. Pell & Co. upon the said New York Cotton Exchange and executed certain orders for the said firm of S. H. P. Pell & Co. upon the said exchange, pursuant to the by-laws rule- and regulations thereof.

That the reasonable value and agreed price, pursuant to the said by-laws, rules and regulations of said services so rendered by your petitioner as aforesaid is the sum of $21.75; that the said sum of $21.75 on the said 31st day of July, 1914, was and now still is due and owing to your petitioner from said firm S. H. P. Pell & Co. and that no part thereof has been paid.

Your petitioner Nathaniel H. Morison has not nor has any other person to the knowledge of your petitioner or for your petitioner's use, received any security for said demand whatsoever, except that your petitioner is entitled to a lien upon the memberships of the alleged bankrupts herein in The New York Cotton Exchange but that the amount to be realized by your petitioner from said lien or security will not and cannot exceed the sum of $1.00.

2. Claim of Gayle L. Young: That on the 31st day of July, 1914, and at all times prior thereto hereinafter mentioned, your petitioner was and now still is a member of the New York Cotton Exchange, a corporation duly organized under the laws of New York.

That at sundry times during the month of July, 1914, and prior to the 31st day thereof, your petitioner at the special instance and request of the firm of S. H. P. Pell & Co. performed and rendered certain services for and to the said firm of S. H. P. Pell & Co. upon the said New York Cotton Exchange and executed certain
38 orders for the said firm of S. H. P. Pell & Co. upon the said exchange, pursuant to the by-laws, rules and regulations thereof.

That the reasonable value and agreed price pursuant to the said by-laws, rules and regulations of said services so rendered by your petitioner as aforesaid, is the sum of $75.00; that the said sum of $75.00 on the said 31st day of July, 1914, was and now still is due and owing to your petitioner from said firm S. H. P. Pell & Co., and that no part thereof has been paid.

Your petitioner, Gayle L. Young has not nor has any other person to the knowledge of your petitioner, or for your petitioner's use, received any security for said demand whatsoever, except that your petitioner is entitled to a lien upon the memberships of the alleged bankrupts herein in the New York Cotton Exchange, but that the amount to be realized by your petitioner from said lien or security will not and cannot exceed the sum of $3.00.

3. Claim of Heineken & Vogelsang, a copartnership composed of Franz Schutte Jr., Hellmuth Maass, Ronald Williams, Percy Dews, J. P. Doughty, Harry L. Goss, George R. Seidenburg, and Charles J. Sorrells: At sundry times prior to July 31, 1914, your petitioner purchased from the said firm S. H. P. Pell & Co. 200 bales of cotton for delivery in the month of July 1914, for an aggregate purchase price of $11,730, and sold to the said firm S. H. P. Pell & Co. 2,000 bales of cotton for delivery as follows: 1,900 bales in the month of December, 1914, and 100 bales in the month of March, 1914 for an

aggregate selling price of $123,335, and that said sales and each of them were made in all respects pursuant to the by-laws, rules and regulations of the New York Cotton Exchange, a corporation
39 duly organized under the laws of New York, of which exchange said Franz Schutte, Jr., Charles J. Sorrells and Harry L. Goss are members.

That said 200 bales of cotton so purchased for delivery during the month of July, 1914, as aforesaid, were duly delivered on or about the 30th day of July, 1914, pursuant to the said by-laws, rules and regulations of the New York Cotton Exchange, and that upon such delivery your petitioner was obliged to pay and did pay pursuant to said by-laws, rules and regulations, and at the request of said S. H. P. Pell & Co., the sum of $70. in excess of the agreed purchase price aforesaid, which sum said S. P. Pell & Co. agreed pursuant to said by-laws, rules and regulations then to repay to your petitioner.

That pursuant to said by-laws, rules and regulations said firm S. H. P. Pell & Co. on July 31, 1914, being then members of said exchange, communicated to said exchange that they were unable to meet their obligations with other members at maturity; and that likewise pursuant to said by-laws, rules and regulations and to the terms of said contracts of sale, your petitioner closed in the open market of said New York Cotton Exchange on July 31, 1914, said contract for said 2,000 bales of cotton at an aggregate selling price of $100,025, which left a balance due to your petitioner from said firm S. H. P. Pell & Co. in the sum of $23,310, which together with the above mentioned sum of $70, made the total sum of $23,380, due your petitioner from said firm S. H. P. Pell & Co. no part whereof has been paid except the sum of $6,981.08, leaving said sum of $16,398.92 due your petitioner from said S. H. P. Pell & Co.

Your petitioner, Heineken & Vogelsang has not nor has any
40 member of said firm, or any other person to the knowledge of your petitioner, or for your petitioner's use, received any security for said demand whatsoever except that your said petitioner is entitled to a lien upon the memberships of the alleged bankrupts herein in the New York Cotton Exchange, but that the amount to be realized by your said petitioner from said lien or security will not and cannot exceed the sum of $500.

Fourth. Your petitioners upon information and belief allege that Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid, the said Robert M. Thompson and the said firm S. H. P. Pell & Co. composed of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid, and of the said Robert M. Thompson, while insolvent and within four months next preceding the date of this petition, committed an act of bankruptcy in that Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid, and the said firm S. H. P. Pell & Co. did heretofore, to wit: on the 31st day of July, 1914, and with the knowledge, consent and approval of the said Robert M. Thompson, make a general assignment for the benefit of their creditors unto Theodore H. Price, and J. Edwards Wyckoff, which assignment was filed in the office of the Clerk of the County of New York on the 31st day of July, 1914.

Wherefore your petitioners pray leave to intervene herein, and that an order may be made and entered herein directing Charles W. Lee and Christian L. Clevenburg, co-partners doing business under the firm name of Charles W. Lee & Co., Marcus J. Parrott and Leigh M. Pearsall, petitioning creditors herein, forthwith to file herein a duplicate original of the petition by them heretofore filed
41 herein on the 3rd day of August, 1914; and that service of said duplicate original of said petition, together with service of this petition with a subpœna be made upon said Robert M. Thompson, individually and as a partner, together with Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid, doing business under said firm name S. H. P. Pell & Co. as provided in the Acts of Congress relating to bankruptcy; that the said Robert M. Thompson be made a party defendant to the above entitled proceeding; that the firm S. H. P. Pell & Co. heretofore prayed to be adjudged bankrupt in the aforesaid petition filed herein on the 3rd day of August, 1914 and now shown to be composed of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid and of the said Robert M. Thompson be adjudged bankrupt; and that the said Robert M. Thompson individually be adjudged bankrupt, all within the purview of the said Acts, and that your petitioners have such other and further relief as may be just.

Dated, New York, November 28, 1914.

NATHANIEL H. MORISON,
GAYLE L. YOUNG,
HEINEKEN & VOGELSANG,
By CHARLES J. SORRELLS.

DAVID H. MILLER,
Attorney for Intervening Petitioning Creditors.

Office & Post Office Address, 15 William Street, Borough of Manhattan, City of New York, New York.

42 UNITED STATES OF AMERICA,
Southern District of New York,
State of New York, County of New York, ss:

Nathaniel H. Morison and Gayle L. Young intervening petitioners mentioned and described in the foregoing petition and Charles J. Sorrells of Heineken & Vogelsang, intervening petitioner mentioned and described in the foregoing petition do hereby severally make solemn oath that the statements of fact contained in the foregoing petition are true according to the best of their knowledge, information and belief, and that the said Charles J. Sorrells further makes oath that he is one of the said copartnership firm of Heineken & Vogelsang.

NATHANIEL H. MORISON.
GAYLE L. YOUNG.
CHARLES J. SORRELLS.

Subscribed and sworn to before me this 28th day of November, 1914.

[NOTARIAL SEAL.] BETH BEYER,
Notary Public, New York County, No. 188,
New York Register No. 6123.

43 District Court of the United States, Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Partners Doing Business under the Firm-name of S. H. P. Pell & Co., Alleged Bankrupts.

UNITED STATES OF AMERICA,
Southern District of New York,
State of New York, County of New York, ss:

David H. Miller, being sworn deposes and says:

First. That he is the attorney herein for Nathaniel H. Morison, Gayle L. Young and Heineken & Vogelsang, intervening petitioning creditors herein, and that the petition of the said intervening-petitioning creditors has been duly filed this day in the office of the Clerk of this Court, and that a copy thereof is hereto annexed, marked "A" and made a part of this affidavit.

Second. That heretofore and on the 23rd day of November, 1914, a motion upon the petition of Logan & Bryan, a partnership which is one of the creditors of the alleged bankrupts herein, verified
44 the 23rd day of November 1914, and praying that Robert M. Thompson be made a party defendant to this proceeding, and that the clerk of this Court be directed to issue a subpœna to be served upon said Thompson, as one of the alleged bankrupts in this proceeding, and that the title of this proceeding be amended accordingly, and that proper proceedings be taken herein to have said Robert M. Thompson as well as all the other members of said firm of S. H. P. Pell & Co. and said firm, adjudicated bankrupts, upon an affidavit of John G. Lonsdale in support thereof, verified the 23rd day of November, 1914, upon a written copy of the statements made by Robert M. Thompson before Hon. Peter B. Olney, as Special Master in the above entitled proceeding, and upon the petition in bankruptcy filed herein on the 3rd day of August, 1914, was noticed to be heard at a term of this Court for the hearing of motions, to be held on the 30th of November, 1914, at ten thirty o'clock in the forenoon thereof, for the relief demanded in the said petition.

Third. That the aforesaid petition of Logan & Bryan has not been filed in the office of the Clerk of this Court.

Fourth. That it is necessary to the due and proper protection of the interest herein of the aforesaid intervening petitioning creditors, of all other parties to this proceeding, of the estate of the firm of

S. H. P. Pell & Co. now in course of administration in this proceeding, and of the creditors interested in said estate, that a motion for the relief demanded in the said petition of the said intervening petitioning creditors be made and a hearing upon such motion
45 be had at the time the said motion upon the petition of Logan & Bryan comes on to be heard herein before this Honorable Court.

Wherefore deponent prays for an order directing all those who have duly appeared in this proceeding to show cause before this Court at a term thereof, to be held at the United States Court House in the Post Office Building in the Borough of Manhattan, City, County and State of New York, on the said 30th day of November, 1914, at 10.30 o'clock in the forenoon thereof, or as soon thereafter as counsel can be heard, why the prayer of said petition of said intervening petitioning creditors should not be granted, and why said intervening petitioning creditors should not have such other and further relief as may be just and proper.

DAVID H. MILLER.

Sworn to before me this 28th day of November, 1914.
[NOTARIAL SEAL.] BETH BEYER,
Notary Public, New York County, No. 188,
New York Register No. 6123.

46 EXHIBIT 3.

Subpœna Served upon Robert M. Thompson.

Subpœna.

UNITED STATES OF AMERICA,
Southern District of New York:

To Robert M. Thompson, in said District, Greeting:

For certain causes offered before the District Court of the United States of America, within and for the Southern District of New York, as a Court of Bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our District Court to be holden at the United States Court House and Post Office Building in said District on the 14th day of December 1914 to answer to petitions filed by Logan & Bryan on Nov. 30, 1914 and by N. H. Morison, G. L. Younge and Heineken & Vogelsang on November 28, 1914 and also to the original petition for adjudication of S. H. P. Pell, C. A. Kittle and H. H. Pell by M. J. Parrott et al. and filed on Aug. 3, 1914 in our said court, the said petitions filed on November 28 and November 30, 1914 praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit under the pains and penalties of what may befall thereon.

The Honorable Charles M. Hough, Judge of said Court and
47 the seal thereof at the Borough of Manhattan City of New York this 30th day of November 1914.

ALEXANDER GILCHRIST, JR.,
Clerk.

Subpœna filed Dec. 7, 1914.

I hereby certify that on the 7th day of December 1914 at 43 Exchange Place, in the City of New York, in my district, I personally served the within subpœna upon the within named Robert M. Thompson by exhibiting to him the within original and at the same time leaving with him a copy thereof. I further certify that at the same time and place, I left with him a duplicate original of the creditor's petition for adjudication herein.

Dated New York December 7, 1914.

WM. HENKEL,
U. S. Marshal, Southern Dist., New York.

48 EXHIBIT 4.

Adjudication of S. H. P. Pell & Co.

In the District Court of the United States for the Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Partners Doing Business under the Firm-name of S. H. P. Pell & Company, Bankrupts.

At New York City, in said District, on the 25th day of November, 1914, before the Honorable Julius M. Mayer, Judge of the said Court in Bankruptcy, the petition of Marcus J. Parrott, Leigh M. Pearsall and Charles W. Lee & Company, a partnership composed of Charles W. Lee and Christian L. Clevenberg, that Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell as individuals and the firm of S. H. P. Pell & Company be adjudged bankrupts, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered and duplicates of said petition together with a subpœna commanding said bankrupts to appear and answer said petition having been duly served upon the said bankrupts and said bankrupts having duly appeared herein by their attorney and no answer having been made or filed by said
49 bankrupts, and the time of said bankrupts within which to answer or plead having expired, the said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell and the firm of S. H. P. Pell & Co. (referred to in the petition herein) are hereby declared and adjudged bankrupts accordingly.

And it is further ordered that the said bankrupts file schedules in triplicate as required by law within ten days from the date hereof.

And it is further ordered that the said matter be referred to Peter B. Olney, one of the referees in bankruptcy of this Court, to take all such further proceedings therein as are required by said Acts of Congress, and all such acts therein as the Court might take or perform, except such as by law or the general orders of the Supreme Court are required to be performed by the Judge; and that the said bankrupts shall attend before said Referee on the 30th day of November, 1914, at 10 o'clock A. M., and thenceforth shall submit to such orders as may be made by said referee or by the Court relating to their said bankruptcy.

Witness, the Honorable Julius M. Mayer, Judge of the said Court, and the seal thereof, at the City of New York, in said District, on the 25th day of November, A. D. 1914.

JULIUS M. MAYER,
District Judge.

[SEAL.]

ALEX. GILCHRIST, JR.,
Clerk.

JULIUS M. MAYER,
United States District Judge.

A true copy.
ALEX. GILCHRIST, JR.,
Clerk.

EXHIBIT 5.

Excerpt from Schedules in Bankruptcy Filed by the Firm of S. H. P. Pell & Co., and by Stephen H. P. Pell, Charles A. Kittle, and Howland H. Pell individually in the bankruptcy proceedings against S. H. P. Pell & Co. in the United States District Court for the Southern District of New York.

Schedule A-3 (Continued).

Reference to ledger or voucher.	Name creditor.	Residence.	When and where contracted.	Nature and consideration of the debt and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person, and if so, with whom.	Amount.
637	Robert M. Thompson.	Southampton, L. I.	N. Y.	Stocks & Cotton.	$3,373,082.30

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51 EXHIBIT 6.

Offer of Composition.

United States District Court for the Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Partners Doing Business under the Firm-name and Style of S. H. P. Pell & Company, Bankrupts.

To Peter B. Olney, Esq., Referee in Bankruptcy, and the Creditors of Stephen H. P. Pell, Charles A. Kittle, and Howland H. Pell, individually and as co-partners doing business under the firm-name and style of S. H. P. Pell & Company, bankrupts:

The undersigned, whose schedules of their property and lists of their creditors, required by law to be filed, have previously been filed herein and who have been examined at a meeting of their creditors herein, do hereby offer terms of composition to their creditors (excepting such creditors as are by law entitled to priority) as follows:

First. This offer is made in consideration of the discharge of the bankrupts, Stephen H. P. Pell, Charles A. Kittle and How-
52 land H. Pell, from their debts, both individual and partnership, and of the release of Robert M. Thompson from any and all liability to said S. H. P. Pell & Co. and from any and all liability to any creditor of S. H. P. Pell & Co. who shall assent hereto, on account of any connection of said Robert M. Thompson with said firm or any transaction of said Robert M. Thompson by or through said firm.

Second. All the assets of every name and nature of S. H. P. Pell & Co., and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, individually, shall be transferred to and vested in John W. Jay, who shall issue certificates of participation in the proceeds of such assets to the creditors herein of S. H. P. Pell & Co. as hereinafter provided: The title of said John W. Jay as to said individual assets of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell shall be subject to the claims allowed herein against the respective estates in bankruptcy of said individuals.

Third. Upon the confirmation of this composition, the Receivers herein shall transfer and deliver unto John W. Jay all the assets and property of every name and nature, of S. H. P. Pell & Co. and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell individually, which are or may come into their hands or under their control, and said Receivers shall execute and deliver to said Jay an assignment and conveyance to said Jay of all of the assets and property of S. H. P. Pell & Co., Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell and of all the right, title and interest of S. H. P. Pell & Co., Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell in and to the same. Each of the bankrupts herein agrees at any

time when requested by said Jay to execute and deliver to him
53 any and all assignments or conveyances that said Jay shall require by way of further assurance or otherwise to perfect his title thereto.

Fourth. Said John W. Jay shall execute, deliver and file herein a trust agreement, in respect of such assets so received by him, in the form hereto annexed, marked Exhibit "A" and made a part hereof.

Fifth. Each creditor of S. H. P. Pell & Co. whose claim has been or shall be allowed in this proceeding, shall receive from said John W. Jay a certificate of participation in the net proceeds of such assets in the form hereto annexed, marked Exhibit "B" and made a part hereof, and entitling such creditor to receive such proportion of the net proceeds of such assets as the amount of the claim of such creditor as allowed in this proceeding, and as stated in such certificate of participation, shall bear to the total amount of claims against S. H. P. Pell & Co. allowed in this proceeding, and the like total amount of such certificates of participation so issued.

Sixth. As to any assets delivered to John W. Jay which are subject to reclamation proceedings, the vesting of title thereto in said Jay as hereinbefore provided shall be subject to the respective rights, if any, of all parties to such reclamation proceedings respectively, heretofore had, now pending or which may be hereafter brought.

Seventh. The claims of the creditors of S. H. P. Pell & Co. whose names and the amounts due such creditors respectively are set forth in Schedule "C" hereto annexed and made a part hereof shall be reduced from such respective amounts by the respective amounts, if any, received by said respective creditors from the sale or proceeds of the three seats in the New York Cotton Exchange now stand-
54 ing in the names of Stephen H. P. Pell and Charles A. Kittle, bankrupts herein, or from the sale or proceeds of the seat in the New York Stock Exchange now standing in the name of Howland H. Pell, bankrupt herein.

Eighth. In consideration of the delivery and transfer to be made as a part of this composition to Robert M. Thompson by the Receivers of S. H. P. Pell & Co. of 20,000 shares of the capital stock of the North Butte Mountain Copper Co., the property of said partnership, and for all the other considerations moving hereunder to Robert M. Thompson, no claim of said Robert M. Thompson against S. H. P. Pell & Co. or against Stephen H. P. Pell, Charles A. Kittle or Howland H. Pell individually, shall be filed, allowed or proved herein, and any and every such claim of Robert M. Thompson shall be waived and released by said Robert M. Thompson.

Ninth. Each and every creditor of S. H. P. Pell & Co. who shall assent to this offer of composition shall, upon the final confirmation of such composition by the Court, be deemed conclusively by his said assent thereto to have released Robert M. Thompson of and from any and all liability to such creditor on account of any connection of said Robert M. Thompson with S. H. P. Pell & Co. or any transaction of said Robert M. Thompson by or through S. H. P. Pell & Co.

Tenth. It shall be adjudged herein that Robert M. Thompson is the owner of all the securities now pledged for certain loans made to S. H. P. Pell & Co., the names of the respective lenders and the respective securities pledged therefor being set forth in Schedule "D"

hereto annexed and made a part hereof, subject to the respective loans for which the same are pledged and to the liens for the
55 payment thereof, and an order shall be entered herein adjudging said securities set forth in said Schedule "D" to be the property of said Robert M. Thompson, subject as aforesaid, and directing the Receivers herein to release to the said Robert M. Thompson all the right, title and interest of the estate in bankruptcy of S. H. P. Pell & Co., Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell in and to said securities, upon the written assumption by Robert M. Thompson of all liability upon said loans respectively and upon his agreement to hold harmless the estate in bankruptcy of S. H. P. Pell & Co., its successors and assigns, from any and all loss, damage and expense by reason thereof. Said Robert M. Thompson shall, within forty-five days from the date of the confirmation of this composition, deliver to said Jay evidence satisfactory to said Jay that the liability of the estates in bankruptcy of S. H. P. Pell & Co. and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell on or on account of all said loans has been released, discharged or extinguished.

Eleventh. Certain securities and property now in the possession of the Receivers of S. H. P. Pell & Co., and set forth in Schedule "E" annexed and made a part hereof, shall be adjudged to be the property of Robert M. Thompson, and said Receivers shall, upon his compliance with the provisions of paragraph Tenth hereof, be authorized and directed to deliver said securities and property set forth in said Schedule "E" to said Robert M. Thompson, free and clear of any and all claims of S. H. P. Pell & Co., and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, their successors or assigns, to such securities and property. All the securities and property re-
56 ferred to in Schedule "E" shall be held as security for the performance by said Thompson of all the provisions of paragraph Tenth hereof.

Twelfth. It shall be adjudged herein that the following securities heretofore pledged (together with other securities) by S. H. P. Pell & Co. are the property of Robert M. Thompson subject (with such other securities) to the liens of the respective pledgees thereof whose names are below set opposite the descriptions of the securities of said Thompson so pledged with them respectively:

Name of Security.	Pledged With.
600 sh. International Nickel Co. preferred	Bankers Trust Co.
350 sh. International Nickel Co. preferred	Manhattan Co.
$30,000 American Ice Securities 6% Debentures	Manhattan Co.
1,000 sh. American Ice Sec. Co	Manhattan Co.
400 sh. Missouri, Kansas & Texas common	Manhattan Co.
$15,000 American Ice Securities 6% Debentures	Columbia Trust Co.
700 sh. Southern Railway Pfd	Kuhn, Loeb & Co.
100 sh. Southern Railway Pfd	Century Bank
200 sh. Missouri, Kansas & Texas common	Century Bank
500 sh. Southern Railway Pfd	Market & Fulton National Bank
100 sh. Missouri, Kansas & Texas common	Market & Fulton National Bank

57 And it shall further be decreed that as between said Thompson and the bankrupt estate of S. H. P. Pell & Co., its creditors, successors and assigns, the pledged securities of said Thompson shall with respect to each individual loan bear such and only such proportion of the burden of the lien of said loan as the value of his securities pledged therefor bears to the total value of all the collateral to such loan. For the above purpose, the basis for the valuation of collateral shall be: (1) with respect to collateral which has been or shall be sold or otherwise realized upon by the pledgee, the amount realized thereon, and (2) with respect to collateral which shall remain unsold after the discharge of the lien thereon, the last public quotation therefor previous to the final sale of collateral to such loan by the pledgee; and the amount of each loan and the amount of the collateral thereto shall be determined as of the date of the first sale (and immediately prior to such sale) by the pledgee of any collateral thereunder (whether heretofore or hereafter had). There shall be no liability to said Thompson on the part of the estate of S. H. P. Pell & Co. by reason of any rights or claims of any person other than said S. H. P. Pell & Co. or Stephen H. P. Pell, Charles A. Kittle or Howland H. Pell, who claims or shall claim any of the collateral in the loans referred to in this paragraph.

Thirteenth. Except as hereinbefore provided, Robert M. Thompson shall release any and all claims to all property, securities and assets of every kind, in the possession or under the control of the Receivers or heretofore pledged by said S. H. P. Pell & Co.

Fourteenth. The intervening petitions herein of Logan & Bryan and of Heineken & Vogelsang, et al. shall be dismissed with-
58 out costs, and an order to that effect shall be entered herein.

Fifteenth. There shall be paid by the Receivers herein all claims against S. H. P. Pell & Co., if any, which are by law entitled to priority, and also all costs and disbursements of the referee, of the Receivers and of the attorneys for the Receivers, petitioning creditors, said intervening petitioning creditors and the bankrupts, all of which shall be passed upon by the Court upon the confirmation of this composition or at such other time as the Court shall direct.

Sixteenth. Nothing in this offer contained or in any assent thereto by Robert M. Thompson or in any acceptance thereof by any creditor of S. H. P. Pell & Co. or of Stephen H. P. Pell, Charles A. Kittle or Howland H. Pell shall be or shall be construed as an agreement, consent or admission for any purpose whatever unless this composition shall be confirmed by the Court.

Dated, December 21, 1914.

STEPHEN H. P. PELL,
CHARLES A. KITTLE,
HOWLAND H. PELL,
Bankrupts.

EXHIBIT "A."

Agreement made this — day of ——, 1915, by and between John W. Jay, of the County and State of New York (hereinafter called The Trustee) party of the first part, and the creditors of S. H. P.
59 Pell & Co. whose claims have been or shall be duly allowed by the District Court of the United States for the Southern District of New York in a certain proceeding in bankruptcy now pending in said Court, entitled "In the Matter of S. H. P. Pell et al., Bankrupts" (hereinafter called Creditors) parties of the second part:

Whereas, certain assets of said S. H. P. Pell & Co., pursuant to an order of said Court in said proceeding, duly entered on the — day of ——, 1915, have been or will be transferred to and vested in title in the Trustee.

Now therefore, in consideration of the premises and of the mutual covenants and promises herein contained, it is agreed as follows:

First. Each creditor of said S. H. P. Pell & Co. whose claim has been or shall be duly allowed by said Court in said proceeding shall receive from the Trustee a certificate of participation in the net proceeds of the assets of said S. H. P. Pell & Co. transferred to and vested in title in said Trustee, in substantially the form hereto annexed marked Exhibit "B" and made a part thereof.

Second. All assets of said S. H. P. Pell & Co. of every name and nature, delivered or transferred, or which shall be delivered or transferred to said Trustee, pursuant to said order of said Court hereinbefore mentioned, shall be held by said Trustee in trust for the benefit pro rata of the creditors of said S. H. P. Pell & Co. whose claims have been or shall be duly allowed, as aforesaid, and to whom certificates of participation have been or shall be issued, as aforesaid, subject to the terms and provisions of this agreement.

60 Third. All the assets received, or which shall be received, by said Trustee of the individual estates in bankruptcy of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, pursuant to said order of said Court, shall subject to the claims allowed in said proceeding against the respective estates in bankruptcy of said individuals, and to the payment of said respective claims from said respective assets and the proceeds thereof, be regarded as assets of said S. H. P. Pell & Co. for all purposes of this agreement.

Fourth. The Trustee shall, with all due diligence, proceed to realize, collect and convert into cash all assets of said S. H. P. Pell & Co. of every name and nature, which shall be delivered, conveyed or transferred to said Trustee, and said Trustee shall have full power and authority to sell at public or private sale, at such times and upon such terms and for such price or consideration as he shall in his discretion deem advisable, any or all of such assets, and to compromise for such an amount or upon such consideration as he shall deem best any claims or rights of action existing or claimed to exist,

or which shall exist or shall be claimed to exist in favor of S. H. P. Pell & Co. or Stephen H. P. Pell, Charles A. Kittle or Howland H. Pell, individually, as he in his discretion may deem proper, and to bring, defend or intervene in any action, suit or proceeding in his name or otherwise, in respect of such assets or any of them, or in respect of any matter or thing in any way connected with or related to the business, property or affairs of said S. H. P. Pell & Co. or of Stephen H. P. Pell, Charles A. Kittle or Howland H. Pell, individually, or connected with or related to this agreement as he may deem proper, and to compromise, discontinue or prosecute
61 any such action, suit or proceeding in his discretion and generally, but without limiting any particular or specific words herein contained, to deal with and realize upon said assets in every respect as the absolute legal owner thereof might do.

Fifth. The proceeds of said assets, as and when received and realized in cash, shall be by said Trustee applied first to the payment of all taxes, charges and expenses, including counsel fees, incurred in and about the performance of this agreement and also including a reasonable compensation for the services of the Trustee hereunder to be from time to time determined by the committee hereinafter named, and any surplus remaining shall be by said Trustee paid and distributed pro rata among the creditors of said S. H. P. Pell & Co. whose claims have been or shall be allowed, as aforesaid, and to whom certificates of participation have been or shall be issued, as aforesaid, in proportion to the respective claims of such creditors. The term "Creditor" as herein used shall be deemed to include the holder of record for the time being of any such certificate of participation so issued.

Sixth. Subject to the advice of counsel, a distribution of the proceeds of said assets of said S. H. P. Pell & Co. as and when received, shall be made by said Trustee whenever the amount so received and on hand, after allowing for taxes, charges and expenses paid, incurred or reasonably expected to be incurred, shall equal five per centum of the total amount of the claims of creditors of said S. H. P. Pell & Co. duly allowed as aforesaid, and for which certificates of participation, as aforesaid, shall have been issued.

62 Seventh. For the purposes of this agreement, a committee is hereby appointed, hereinafter called The Committee, consisting of Archibald B. Gwathmey, Jr., Nathaniel L. Carpenter, R. M. Stuart Wortley, W. Hustace Hubbard, Walter L. Johnson, William C. Fraser and John G. Lonsdale. In event of any vacancy or vacancies occurring in said Committee at any time or from time to time, the remaining member or members of the Committee for the time being shall appoint other persons or person to fill such vacancy or vacancies, and any person so appointed shall have all the powers of a member of the Committee as if herein named. The term "Committee" as herein used, shall mean the Committee as now or hereafter constituted. The Committee shall, from time to time, pass upon and fix the reasonable value of the services of the Trustee hereunder and the reasonable value of the services of any counsel retained by the Trustee hereunder, and the decision of the Committee in each such

case shall be final and conclusive. The Committee may in any case act by a majority of the members thereof for the time being, with or without a meeting, and the reasonable expenses of the Committee hereunder shall be deemed to be part of the expenses of the Trustee, but the members of the Committee shall receive no compensation for their services. The Trustee may in his discretion from time to time apply to said Committee for advice.

Eighth. In event of the death, refusal, inability or failure for any cause, of the Trustee to act hereunder, the Committee shall designate in writing a successor Trustee, and upon the filing with the Committee of the written acceptance of such designated successor of such designation and of this agreement, all assets then held by the
63 former Trustee hereunder and all proceeds of any assets not theretofore distributed, shall be transferred to and be vested in such successor Trustee without further act or deed.

Ninth. The Committee may from time to time require the Trustee to give a bond satisfactory to the Committee and in such amount as they shall determine, contitioned upon the faithful performance by the Trustee of this agreement.

Tenth. The term "Trustee" as herein used, shall be deemed to include any successor designated by the Committee, and the power of the Committee to designate a successor Trustee may be exercised from time to time when necessary.

Eleventh. Neither the Trustee nor any member of the Committee shall be liable for any act done or omitted under the advice of counsel, nor for any mistake of fact or law, nor for any act or omission of any agent or attorney chosen in good faith and with reasonable discretion, nor in any event except for his own wilful negligence or bad faith.

Twelfth. Each creditor of S. H. P. Pell & Co. by accepting a certificate of participation hereunder, shall become a party hereto and shall thereby agree to and be bound by each and every provision, term and condition herein contained and also by each and every provision, term and condition contained in said order of The District Court of the United States for the Southern District of New York duly entered on the — day of ——, 1915, in said proceeding entitled "In the Matter of S. H. P. Pell et al., Bankrupts," to which order reference is hereby made.

Thirteenth. The filing of this agreement in the office of the
64 Clerk of the District Court of the United States for the Southern District of New York shall be deemed a delivery hereof.

Fourteenth. This agreement and each covenant and promise herein contained shall bind each party hereto, his heirs, executors, administrators, successors and assigns, and shall be construed according to the laws of New York.

In witness whereof, said John W. Jay has hereto subscribed his name, affixed his seal, and delivered this agreement, on the day and year first above written.

—— —— [L. S.]

EXHIBIT "B."

No. —. $—.

Estate of S. H. P. Pell & Co.

Participation Certificate

This certifies that —— —— is entitled to participate, together with the holders of record of like certificates hereto, in the net proceeds of certain assets of the estate of S. H. P. Pell & Co. in bankruptcy, heretofore or hereafter transferred to the undersigned as Trustee, pursuant to a certain order of the District Court of the United States for the Southern District of New York duly entered on the — day of ——, 1914, in a proceeding in bankruptcy entitled "In the Matter of S. H. P. Pell et al., Bankrupts," in the proportion that $— (the amount of the claim heretofore filed by the holder to whom
65 this certificate now is, or to whom a like certificate in amount hereof before transfer was originally issued and duly allowed in and by said Court) bears to the total amount of the claims against said S. H. P. Pell & Co. allowed or to be allowed by said Court in said proceeding, and in respect of which like certificates heretofore have been or hereafter are to be issued, as in said order provided.

This certificate is issued subject to the terms of said order of said Court to which reference is hereby made, and also subject to the terms of an agreement of trust executed by John W. Jay and dated the — day of ——, 1915, to which reference is hereby made, and the holder hereof by accepting this certificate hereby expressly binds himself to each and every provision, term and condition in said order and in said agreement of trust contained.

This certificate is transferable only on the books kept for that purpose by the undersigned, at the office of the — Trust Company, or its successor or successors, as agent for the transfer of such certificates, by the registered holder, either in person or by attorney duly authorized, according to the provisions of said agreement of trust and according to the rules from time to time established for that purpose by the undersigned, and on surrender of this certificate properly endorsed, and until so transferred the undersigned may treat the registered holder as owner hereof for all purposes whatsoever.

Payments hereunder shall be made only upon presentation of this certificate to the undersigned for endorsements of said payments thereon.

This certificate is not valid unless countersigned by the said
66 — Trust Company as agent for the transfer of certificates, or its successor or successors, as said agent.

In witness whereof, the undersigned has executed this certificate this — day of ——, nineteen hundred and fifteen.

(Estate of S. H. P. Pell & Co.)

(Participation Certificate.)

(Reverse.)

Payments made under within certificate.

Date.	*Amount Paid.*	*Signature.*
*	*	*
*	*	*
*	*	*
*	*	*
*	*	*
*	*	*
*	*	*

For value received — hereby sell, assign and transfer unto — all the property, right, title and interest represented by the within certificate, the transferee to take the same subject to all the terms and conditions of the order and of the agreement referred to therein and do hereby irrevocably constitute and appoint —— —— Attorney to do all acts necessary to transfer said property, right, title and interest, with full powers of substitution in the premises.

Witness — hand this — day of ——, 191—.

In presence of

—— ——. —— ——.

67 SCHEDULE "C."

Name of Creditor.	Amount Due.
Browning & Co. (the amount due Browning & Co. is subject to an application herein by one Hicks which may reduce such amount)	$44,958.50
H. F. Bachman & Co.	34,346.55
Finley, Barrell & Co.	986.65
Baruch Bros.	1,123.53
John F. Black & Co.	27,838.85
J. S. Bache & Co.	21,036.38
Bailey & Montgomery	16,728.80
Bailey & Guild	2,204.08
Byrne & McDonnell	10,518.91
Geo. Brennecke & Co.	5,215.00
Caldwell Cosgrove & Co.	1,335.00
E. K. Cone	1,312.03
S. B. Chapin & Co.	22,881.68
Carpender & McClave	840.00
Henry Clews & Co.	1,985.00
Chisholm & Chapman	6,729.46
Dick Bros. & Co.	52,455.00
W. R. Craig & Co.	131,039.17
Chas. Fairchild & Co.	6,553.44

Name of Creditor.	Amount Due.
Gwathmey & Co.	135,445.22
S. Gruner & Co.	15,260.19
Hubbard Bros. & Co.	139,340.93
E. F. Hutton & Co.	65,410.89
Henry Hentz & Co.	115,138.46
Herklotz Corn & Co.	43,689.86
R. H. Hooper & Co.	27,238.81
Halle & Steiglitz	1,083.19
H. L. Horton & Co.	4,845.00
Hopkins, Dwight & Co.	5,267.59
68 Heineken & Vogelsang	16,398.92
Harris Winthrop & Co.	1,385.00
W. E. Hutton & Co.	170.00
C. I. Hudson & Co.	6,593.96
L. de Gumoens & Son	177.75
Geo. F. Jones & Son	6,789.01
Jenks, Gwynne & Co.	53,601.32
Daniel O'Dell & Co.	9,290.49
Judson & Co.	2,328.71
Josephthal Louchheim & Co.	22,292.50
Chas. W. Lee & Co.	1,730.00
Arthur Lipper & Co.	10,020.00
Logan & Bryan	30,769.62
Lehman Bros.	17,639.08
Miller & Co.	23,388.34
Mohr, Hanemann & Co.	13,860.00
Moyse & Holmes	38,712.37
Norman Mayer & Co.	92,113.69
Geo. H. McFadden & Bro.	29,853.34
Robert Moore & Co.	14,648.18
Newborg & Co.	16,236.71
A. Norden & Co.	9,186.51
Newman Bros. & Worms	36,912.90
Orvis Bros. & Co.	25,562.27
Post & Flagg	50,785.00
M. J. Parrott	4,650.00
Raymond Pynchon & Co.	47,409.98
Royce & Co.	18,480.76
Rogerson & Donnell	5,205.00
R. H. Rountree & Co.	12,595.17
E. & C. Randolph	16,840.15
Renskorf, Lyon & Co.	22,722.70
Morris H. Rothschild & Co.	37,826.05
Wm. Ray & Co.	14,139.03
69 N. L. Carpenter & Co.	104,225.98
Springs & Co.	5,737.28
Seligman & Meyer	2,044.02
Shearson, Hammill & Co.	115,034.86
Geo. C. Searle & Son	8,489.43
L. H. Starkey & Co.	30,337.37

Name of Creditor.	Amount Due.
Rhd. Siedenburg & Co.	13,495.48
Geo. M. Schutt & Co.	51,151.99
Sternberger, Sinn & Co.	10,721.56
Thompson, Towle & Co.	32,225.83
Atwood Violett & Co.	2,215.00
S. M. Weld & Co.	113,895.00
A. L. Wolff & Co.	38,110.84
Wrenn Bros. & Co.	13,153.50
J. R. Williston & Co.	41,633.44
Wardwell & Adams	135.00
Woodward & Stillman	7,444.84

70 SCHEDULE "D."

Name of lender.	Original amount of loan.	Securities pledged.
Guaranty Trust Company	$100,000	1200 shs. International Nickel Company Common.
Guaranty Trust Company	$100,000	1200 shs. International Nickel Company *Common*.
Guaranty Trust Company	$200,000	2200 shs. International Nickel Company Common.
Guaranty Trust Company	$100,000	700 shs. International Nickel Company Common. 600 shs. International Nickel Company Preferred.
J. P. Morgan & Company	$100,000	1200 shs. International Nickel Company Common.
Lazard Freres	$100,000	1300 shs. International Nickel Company Common.
Astor Trust Company	$100,000	1200 shs. International Nickel Company Common.
Equitable Trust Company	$100,000	1300 shs. International Nickel Company Preferred.
Brooklyn Trust Company	$100,000	800 shs. International Nickel Company Common. 400 shs. International Nickel Company Preferred.
Metropolitan Trust Co.	$100,000	1200 shs. International Nickel Company Common.
Metropolitan Trust Co.	$100,000	100 shs. International Nickel Company Preferred. 4300 shs. American Ice Securities Co. $35,000 American Ice 6% Debentures.
Empire Trust Company	$100,000	1200 shs. International Nickel Company Common.
Liberty National Bank	$100,000	1200 shs. International Nickel Company Common.
Liberty National Bank	$100,000	800 shs. International Nickel Company Common. 300 shs. International Nickel Company Preferred.
Liberty National Bank	$25,000	350 shs. International Nickel Company Preferred.
Seaboard National Bank	$100,000	1200 shs. International Nickel Company Common.

Name of lender.	Original amount of loan.	Securities pledged.
Seaboard National Bank.....	$100,000	1200 shs. International Nickel Company Common.
Seaboard National Bank.....	$100,000	1200 shs. International Nickel Company Common.
Bankers Trust Company.....	$100,000	1200 shs. International Nickel Company Common.
Bankers Trust Company.....	$100,000	1200 shs. International Nickel Company Common.
Bankers Trust Company.....	$100,000	1200 shs. International Nickel Company Common.
James Talcott	$25,000	300 shs. International Nickel Company Common.

71 SCHEDULE "E."

List of Securities and Property Alleged to Belong to Robert M. Thompson, in the Possession of the Receivers of S. H. P. Pell & Co.

Bonds.

$15,000	Bayonne Casting Co.
18,000	Atlantic, Gulf & West Indies 5%.
1,000	National Golf Links of America 5% deb.
52,500	International Motor Co. 6's Series B.
8,900	American Ice Sec. Debenture 6's.
12,500	Manoti Sugar Syndicate Participation.
1,000	Army and Navy Club of Washington 5%.
7,500	International Contract Vending Co. 6%.
400	Shawmut S. S. Co. 6%.
25,000	Consolidated Arizona Smelting Co. Income Bonds.

Stocks.

228	Atlantic, Gulf & West Indies Preferred.
114	Atlantic, Gulf & West Indies Common.
100	International Motor Company Preferred.
1,050	International Motor Company Common.
525	International Contract Vending Co.
250	Acme Graphite Company, Preferred.
750	Acme Graphite Company, Common.
$76.21	Preferred Scrip New Orleans Mobile & Chicago.
5.22	Common Scrip New Orleans, Mobile & Chicago.
2,500	Northern Ventures, Ltd.
20	National Bank of North America.
200	Pell's Spot Cotton Co.
50	American Ice Securities, Common.
150	Tide Water Paving Brick Co., Preferred.
75	Tide Water Paving Brick Co., Common.
50	Rome Wire Co., Preferred.
12½	North Eastern Agency.
30	Long Island Motor Parkway Co., Preferred.
15	Long Island Motor Parkway Co., Common.
100	Steel Package Co., Preferred.
50	Steel Package Co., Common.
11	Southern Ry. Co., Preferred.
11	Southern Ry. Co., Common.
2	Dupont Powder Co., Preferred.
2	Newport Reading Rooms.
1	South Side Sportsman Club.
102	Price Campbell Cotton Picker Co., Pfd.

200	Price Campbell Cotton Picker Co., Common.
$12.01	Price Campbell Cotton Picker Co., Pfd. Scrip.
1,484.07	Price Campbell Cotton Picker Co., Common Scrip.
25	Nassau Light & Power Co.
2	Founders Co.
25	Sprague Development Co.
100	Portsmouth Engine Co.
5	Washington Riding Co.

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$41.67	International Contract Vending Co. Scrip.
2	Shawmut S. S. Co., Preferred.
10	Shawmut S. S. Co., Common.
$50	Shawmut S. S. Co., Preferred Scrip.
18	International Nickel Co., Non-Voting Pfd.
25	International Nickel Co., Voting Trust, Pfd.
37	International Nickel Co., Common, Non-voting.
$30	Check dividend on 12 International Nickel Com. in Name S. H. P. Pell, due Sept. 1, 1914.

Mining Stock.

39,375 shs.	North Butte Mountain Copper Co.
2,050 "	San Toy Mining Co.
1,100 "	Tri Bullion Smelting & Development Co.
1,033 "	Dome Mines Co.
100 "	Malones Mines Co.
10,000 "	Pueblo Mining Co.
70,000 "	Colorado-Arizona Mines.
36,137 "	Consolidated Arizona Smelting Co.

Notes.

$18,000	Note, John L. McNeil, Demand Order Robert M. Thompson, Collateral 125 shs. First National Bank Durango, Dated July 11, 1914.
17,946.08	Note, G. B. Garrison. Order Pell & Co. Collateral 7,000 shs. California Nevada Copper Co. 3,750 shs. Cash Mines Co., Dated May 5, 1914. Due Sept. 5, 1914. Past Due.
5,000	Note, C. N. Fairchild, Order S. H. P. Pell & Co. on demand. Dated Feb. 14 1911.
5,000	Note, G. B. Garrison. Order S. H. P. Pell & Co. (6 mos.) Collateral 50 shs. Middleton-Garrison Feature Film Co. Dated Oct. 23, 1913. Due Apr. 23, 1914. Past Due.
4,080	Note, Ella A. Boriand. Order Robert M. Thompson. Dated Aug. 20, 1914. Due Dec. 20, 1914.
1,000	Note, Bessie H. Kane, Order S. H. P. Pell & Co. Collateral 10 Pacific Hardware & Steel Pfd. Dated April. 21, 1914. Due Oct. 21, 1914.
$10,000	Note, William H. Staton, Order American Exchange Natl. Bank (3 mos.). Collateral Upper Hudson Stone Quarry Co. Dated Jan. 5, 1914. Due April 2, 1914.
2,000	Note, Bessie H. Kane. Order R. M. Thompson (3 mos.). Collateral 20 shs. Pacific Hardware & Steel Co. pfd. Dated Oct. 28, 1913. Due Jan. 28, 1914. Past Due.
11,390.75	Note, S. A. Benner. Order R. M. Thompson. Dated May 14, 1914. Due Nov. 14, 1914. Past Due.
1,000	Note, Robert T. Garrison. Order S. H. P. Pell. Endorsed. (1 Yr.). Dated June 20, 1914. Due June 20, 1915.
500	Note, Robert T. Garrison. Order S. H. P. Pell. Endorsed. (6 mos.). Dated June 20, 1914. Due Dec. 20, 1914.
400	Note, Chas. T. and K. M. Hellier. Order Blue Diamond Fruit Co. Endorsed to S. H. P. Pell & Co. (1 yr.). Dated July 1, 1914. Due July 1, 1915.

800	Note, J. K. Williams, Jr., Order Blue Diamond Fruit Co. Endorsed to S. H. P. Pell & Co. (1 yr.). Dated July 20, 1914. Due July 20, 1915.
14,532.50	Note, Chas. E. Gibbs. Order R. M. Thompson (6 mos.). [Note in hands of attorneys.] Collateral 62 Pacific Hdw. & Steel Com. 115 Pacific Hdw. & Steel, pfd. Dated Sept. 16, 1912. Due Mar. 16, 1913.

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Miscellaneous.

25,000	Policies on life Francis W. Beiknap, Massachusetts Mutual Life Ins. Co.
2,000	Bond & Mtge. Chas. E. Frankenbach to R. M. T.
2	Blank checks American Exchange National Bank.
2	Blank checks Corn Exchange Bank.
2	Notes, New York Trust Co.

Drafts on National Provincial Bank of London:

25240		296739
25241	(mutilated)	296740
25242		296749
25243		296584
25244		296579.

Envelope, lease Washington property, etc.
Envelope, Unsigned note, C. N. Confeld.
Receipt, $20,000. Central San Cristobal bonds.
Blank power of attorney, 2,000 share- Amer. Ice Securities Co.
Bundle E. (coupons Massey Station Mining Co.)
Paid Note, G. B. Garrison $1015, dated Sept. 1, 1911. (3 mos.) to Bank North Hempstead, Port Washington, N. Y.

United States District Court for the Southern District of New York.

In Bankruptcy. No. 20,159.

In the Matter of S. H. P. PELL & Co. et al., Bankrupts.

To Peter B. Olney, Esq., Referee in Bankruptcy:

The offer of composition herein, of which the foregoing is a copy, is hereby accepted by the undersigned creditors of S. H. P. Pell & Co. whose signatures, addresses and the amounts in which their respective claims have been filed are hereafter set out:

Dated, December —, 1914.
Signature of Creditor — Address — Amount —

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EXHIBIT 7.

Petition for Order of January 6, 1915.

United States District Court, Southern District of New York.

In Bankruptcy. No. 20,159.

In the Matter of STEPHEN H. P. PELL, HOWLAND H. PELL and Charles A. Kittle, Co-partners Doing Business under the Firm-name of S. H. P. Pell & Company, Bankrupts.

Please take notice that we will present to the Hon. Augustus N.

Hand District Judge, sitting in the District Court of the United States for the Southern District of New York at his Chambers in the Federal Building Borough of Manhattan City of New York at 2 o'clock p. m. on the 6th day of January 1915, a petition of which a copy is hereto annexed and shall then apply for the instructions of said Court and for an order duly embodying the same.

Dated New York January 6, 1915.

Yours etc.

ROBERT FORSYTH LITTLE,
Attorney for Receivers,
2 Rector Street, New York City.

75 To

David H. Miller, Esq., Attorney for Petitioning Creditors, 15 William Street, New York City.

Messrs. Wollman & Wollman, Attorneys for Logan & Bryan, 20 Broad Street, New York City.

United States District Court, Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, HOWLAND H. PELL, and Charles A. Kittle, Co-partners Doing Business under the Firm-name and Style of S. H. P. Pell & Company, Bankrupts.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield respectfully shows to this Court and alleges:

76 I. That heretofore and on August 3, 1914 a petition praying that the above named Stephen H. P. Pell, Howland H. Pell and Charles A. Kittle be adjudged bankrupts both individually and as members of the firm of S. H. P. Pell & Company was filed in the office of the Clerk of the District Court of the United States for the Southern District of New York.

II. That thereafter and on August 4, 1914, by order of this Court, your petitioners Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield were duly appointed receivers of the above mentioned alleged bankrupts and thereafter duly qualified and are now acting as such receivers. That from time to time your petitioners as such receivers have been authorized by this Court to continue the business of the bankrupts herein up to and including the present time.

III. Upon information and belief that prior to the filing of the petition in bankruptcy herein the said firm of S. H. P. Pell & Company had obtained from certain lenders hereinafter specified certain loans of money, and as security for the repayment thereof had pledged with such lenders common and preferred shares of International Nickel Company and certain shares and bonds of American

Ice Securities Company; the names of the respective lenders, the original amounts of such loans respectively and an enumeration of such shares and bonds pledged, being set forth in a schedule designated as Schedule "D" attached to a certain offer of composition dated December 21, 1914 proposed by the said bankrupts, a copy of which is hereto annexed and made a part hereof and marked Exhibit "A."

77 IV. Upon information and belief said Robert M. Thompson claims that the said shares and bonds so pledged belonged to him at the time the same were pledged but that the same were pledged by said firm of S. H. P. Pell & Company for their own debt with the knowledge and consent of said Robert M. Thompson and the said Robert M. Thompson has heretofore instituted a proceeding in this Court praying that the said securities be adjudged to be his property, subject to the liens of the respective lenders and that he be permitted to redeem any or all of the said securities from the said liens by the payment of the amounts loaned thereupon and be allowed to receive the same into his possession and control.

V. That certain of the lenders mentioned in said Schedule "D" of said Exhibit "A" have heretofore obtained orders from this Court authorizing them to sell the said securities so pledged with them respectively and all of said lenders have demanded payment of the amounts of said loans. Your petitioners are unable further to protect said securities so pledged and said securities are in danger of being sold out by such lenders which may result in deficiency claims by said lenders against the estate of S. H. P. Pell & Company.

VI. That said Robert M. Thompson claims to have been a special partner in said firm of S. H. P. Pell & Company; that certain creditors herein have alleged that said Robert M. Thompson was a general partner of said firm of S. H. P. Pell & Company at and before the time of bankruptcy and that certain of said creditors have heretofore filed in this Court intervening petitions alleging said partnership and praying that said Robert M. Thompson be ad-

78 judged a bankrupt herein; that said intervening petitions are now pending and that the time to an answer said petitions has not yet expired.

VII. That an offer of composition dated December 21, 1914 a copy of which is hereto annexed and made a part hereof marked Exhibit "A" has been made herein and is now pending, and that such offer of composition provides among other things for the settlement of all questions and disputes with said Robert M. Thompson and for the dismissal of said intervening petitions against said Robert M. Thompson. Your petitioners are informed and believe, and refer in that regard to the affidavit of David H. Miller hereto annexed and made a part hereof and marked Exhibit "B" that said composition has been accepted not only by said Robert M. Thompson but by creditors of the bankrupt estate whose claims aggregate an amount in excess of $2,300,000 out of a total amount of claims approximating $2,500,000 (exclusive of a claim in the amount of $2,500,000 made by said Robert M. Thompson) and referring further to said affidavit of said David H. Miller on information and belief that said composition has been accepted by a large majority in number of the creditors

whose claims have been filed herein having been accepted by upwards of 160 of said creditors out of a total number so filed of 285. That if the said composition becomes effective, by the terms thereof your petitioners will be directed to release to the said Robert M. Thompson all the right title and interest of the estate in bankruptcy of the bankrupts herein in and to said securities set forth in said Schedule "D" of Exhibit "A" as set forth in said composition agreement Exhibit "A."

79 VIII. Your petitioners have subject to the approval of the Court entered into a contract with the said Robert M. Thompson a copy of which is hereto annexed marked Exhibit "C" providing for the payment of the said loans by said Robert M. Thompson and the assignment by the petitioners of all the right and interest of the bankrupts in and to the securities pledged therefor upon the terms and conditions in said contract contained.

IX. Your petitioners are of the opinion that it is for the best interests of the bankrupt estate that such securities be assigned to said Robert M. Thompson upon his paying off the said loans under the terms and conditions of the contract hereinabove referred to.

Wherefore your petitioners respectfully pray that they may be instructed in the premises and respectfully suggest that an order be entered ratifying and approving the said contract Exhibit "C" annexed hereto and authorizing your petitioners to execute the written instruments of assignment and release therein referred to.

Dated January 6, 1915.

THEODORE H. PRICE.
ARTHUR R. MARSH.
JOSEPH M. HARTFIELD.

80 STATE OF NEW YORK,
County of New York, ss:

Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield being duly sworn each for himself deposes and says; that he is one of the petitioners above named. That he has read the foregoing petition and knows the contents thereof and that the same is true except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

THEODORE H. PRICE.
ARTHUR R. MARSH.
JOSEPH M. HARTFIELD.

Sworn to before me this 6th day of January, 1915.
[SEAL.] WILLIAM F. GERNER,
Notary Public, Kings Co. 175
Certificate Filed in N. Y. Co. 86.

EXHIBIT "A."

(Copy of composition offer hereto annexed.)

81 EXHIBIT "B."

United States District Court, Southern District of New York.

In Bankruptcy. No. 20159

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE and Howland H. Pell, Individually and as Partners Doing Business under the Firm Name of S. H. P. Pell & Co., Alleged Bankrupts.

STATE OF NEW YORK,
County of New York, ss:

David Hunter Miller being sworn deposes and says; that he is the attorney for the petitioning creditors in the above entitled matter and is familiar with all proceedings had and taken herein; that the offer of composition made by the above named bankrupts to their creditors under date of December 21, 1914, a copy of which is attached to the petition herein of Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield verified the 6th day of January 1915 as Exhibit "A" has been accepted by Robert M. Thompson the person claiming to be the owner of the securities mentioned in Schedule "D" attached to said offer of composition and has also been
82 accepted by creditors of the bankrupt estate whose claims aggregate an amount in excess of two million three hundred thousand dollars ($2,300,000) out of a total amount of claims approximately two million five hundred thousand dollars ($2,500,000) (exclusive of a claim in the amount of about two million five hundred thousand dollars ($2,500,000) made by said Robert M. Thompson).

Deponent further says that the said offer of composition has also been accepted by a large majority in number of the creditors whose claims have been filed herein having been accepted by upwards of one hundred and sixty (160) of said creditors out of a total number so filed of about two hundred and eighty-five (285).

DAVID H. MILLER.

Sworn to before me this 6th day of January, 1915.
[SEAL.] WILLIAM F. GERNER,
Notary Public, Kings Co. #175.
Certificate filed in N. Y. Co. 86.

83 EXHIBIT "C."

This Agreement entered into this sixth day of January, 1915, between Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield, as receivers in bankruptcy of the firm of S. H. P. Pell & Company, hereinafter called the Receivers, parties of the First Part, and Robert M. Thompson, party of the Second Part.

Whereas the parties of the First Part on August 4, 1914, were appointed by the United States District Court for the Southern District of New York as receivers of the firm of S. H. Pell & Company bankrupts, and

Whereas an offer of composition dated December 21, 1914 has been made by the said bankrupts and is now pending by virtue of which if the same becomes effective the Receivers will be directed to release to the said Robert M. Thompson all the right, title and interest of the estate in bankruptcy of said firm of S. H. P. Pell & Company in and to certain securities mentioned and described in Schedule "D" attached to said offer of composition upon the written assumption by said Robert M. Thompson of all liability upon certain loans for the repayment of which said securities are pledged and

Whereas such loans have been called and the securities pledged therefor are in danger of being sold by the pledgees and

Whereas the said Robert M. Thompson has agreed pending the consummation of said composition to pay the said loans upon a transfer to him of the said securities and, in the event of a failure of the composition and an adjudication that said securities were
84 at the time of the filing of the petition in bankruptcy the property of said firm of S. H. P. Pell & Company and were not at said time the individual property of Robert M. Thompson, or an adjudication that said Robert M. Thompson was at said time a general partner in said bankrupt firm, to hold himself accountable for the said securities or the proceeds thereof (less the amount of present liens thereon),

Now therefore this agreement Witnesseth:

First. The Receivers shall upon the entry of an order by the United States District Court for the Southern District of New York approving their execution of these presents, forthwith execute and deliver to said Robert M. Thompson proper written instruments by which the Receivers will assign, transfer, release and quitclaim to said Robert M. Thompson all the interest which the parties of the First Part as receivers of S. H. P. Pell & Company may have or may claim to have in and to the securities described in said Schedule "D" attached to said offer of composition upon the payment and discharge by said Robert M. Thompson of the amount of the said loans and which instruments will respectively direct the said lenders to transfer and deliver to said Robert M. Thompson the said securities upon the payment and discharge of the amount of the said loans.

Second. Robert M. Thompson hereby agrees that he will within thirty (30) days pay the amounts of said loans respectively and will relieve the bankrupt estate from all possible liability on any and all loans specified in said Schedule "D" attached to said offer of composition.
85 Third. Robert M. Thompson further hereby agrees that upon receiving said securities or any of them from said lenders, if said composition shall not become effective, within six months from the date hereof and if it be adjudged that the ownership of said securities or any of them is not in said Robert M. Thompson subject to said loans, or if it be adjudged that said Robert M. Thompson was at the time of the filing of said petition in bankruptcy a general partner in said bankrupt firm said Robert M. Thompson will hold himself as a trustee for said receivers or their successors in trust for

the benefit of the estate of S. H. Pell & Company or for his individual creditors as their respective interests may be hereafter determined and for the use and benefit thereof in respect of the equities in said securities over and above the amount of the present loans thereon and will in such event account for such equities. Such equities may be accounted for either in the securities themselves or in case the said Robert M. Thompson shall have sold or disposed of the same, then in the proceeds thereof.

Said Robert M. Thompson upon the request of the receivers or in case a trustee in bankruptcy shall be appointed then upon the request of such trustee or from time to time and as often as requested, render an account as to the disposition he has made of said securities.

In the event of the confirmation of such composition the said Robert M. Thompson shall hold said securities or their proceeds in accordance with and as provided for in said composition agreement Exhibit "A."

Fourth. No person acquiring from said Robert M. Thompson the said securities so specified in Schedule "D" of said offer of
86 composition shall be required to see to the application of the purchase price thereof,

In witness whereof the parties hereto have hereunto set their hands and affixed their seals the day and year first above written.

——— ———,
——— ———,
Receivers in Bankruptcy of S. H. P. Pell & Company.

STATE OF NEW YORK,
County of New York, ss:

On this 6th day of January 1915 before me personally appeared Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield to me known and known to me to be the parties described in and who as receivers of the bankrupt firm of S. H. Pell & Company executed the foregoing contract and they severally acknowledged to me that they executed the same for the purposes therein stated.

———— ————.

STATE OF NEW YORK,
County of New York, ss:

On this 6th day of January 1915 before me personally appeared Robert M. Thompson to me known and known to me to be one of the persons described in and who executed the foregoing contract and he acknowledged to me that he executed the same for the purposes therein stated.

———— ————.

87 United States District Court, Southern District of New York.

In the Matter of STEPHEN H. P. PELL, HOWLAND H. PELL and Charles A. Kittle, Co-partners Doing Business under the Firm Name and Style of S. H. P. Pell & Company, Bankrupts.

In consideration of the receivers and the creditors of S. H. P. Pell & Company obtaining from the above Court an order under a

petition which has this day been presented to Hon. Augustus N. Hand one of the Judges of said Court with reference to the securities set forth in said petition, said Thompson hereby accepts the within offer of composition of S. H. P. Pell & Company and agrees to do everything that under the terms thereof he is required to do and agrees in every way so far as the provisions thereof concern himself, to carry out the same.

Dated, January 6, 1915.

ROBERT M. THOMPSON.

88 STATE OF NEW YORK,
County of New York,
Southern District of New York, ss.:

On this sixth day of January 1915, before me personally appeared Robert M. Thompson to me known and known to me to be the person described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

AUGUSTUS N. HAND,
Judge of the United States District Court.

89 EXHIBIT 8.

Order of January 6, 1915.

At a Stated Term of the District Court of the United States for the Southern District of New York held in the United States Court House in the Post Office Building, Borough of Manhattan City of New York on the 6th day of January, 1915.

Present: Honorable Augustus N. Hand, District Judge.

In Bankruptcy. No. 20,159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE and Howland H. Pell Individually and as Partners Doing Business under the Firm-name of S. H. P. Pell & Company, Bankrupts.

Upon the petition of Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield, as receivers herein, verified the 6th day of January 1915 praying for instructions and suggestions that an order be entered ratifying and approving the contract Exhibit "C," copy of which is annexed to said petition and authorizing said receivers to execute the written instruments of assignment and release in said contract referred to and upon the consent and agreement of
90 Robert M. Thompson, to the offer of composition annexed to said petition as Exhibit "A" thereto and upon all proceedings had and taken herein; and David Hunter Miller, Esq., attorney for the petitioning and other creditors and Wollman and Wollman Esqs., attorneys for Logan & Bryan and other creditors, and Hawkins, Delafield and Longfellow attorneys for Gwathmey & Co. and Phelan

Beale attorney for H. Keaty & Co. et al., having appeared and consented hereto and Stover & Hall Esqs., attorneys for W. R. Craig & Co. appearing and not opposing

Now on motion of Robert Forsyth Little attorney for the receivers herein it is hereby

Ordered: That the contract bearing date January 6, 1915 entered into between Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield as receivers and Robert M. Thompson, a copy of which contract is annexed to said petition, be and the same is hereby ratified and approved and it is further

Ordered: That said Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield, are hereby instructed and directed to assign, transfer, release and quitclaim to Robert M. Thompson by proper written instruments all the interest which the said receivers or the bankrupts may have or may claim to have in and to the securities described in Schedule "D" attached to the offer of composition annexed to the petition herein as Exhibit "A" thereof upon the payment and discharge by said Robert M. Thompson of the amount of the loans to secure which said securities are pledged, which instruments shall direct the transfer and delivery to said Robert M. Thompson of the said securities upon the payment and discharge of the
91 amount of such loans and it is further

Ordered That the said receivers shall execute all further instruments and do all further acts that may be necessary to carry the said contract into full force and effect.

AUGUSTUS N. HAND,
District Judge.

We the undersigned, hereby consent to the foregoing order.

PHELAN BEALE,
Attorney for H. Keaty & Co. et al.
WOLLMAN & WOLLMAN,
Attorneys for Logan & Bryan.
DAVID MILLER,
Attorney for Petitioning Creditors.

Dated January 6, 1915.

92 EXHIBIT 9.

Order of Confirmation of Composition Agreement.

United States District Court for the Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Co-partners Doing Business under the Firm-name and Style of S. H. P. Pell & Company, Bankrupts.

An application for the confirmation of the composition duly offered by the bankrupts dated December 21, 1914 having been filed in this

Court and it appearing that such composition duly filed herein has been accepted by a majority in number of all the creditors whose claims have been allowed and that such creditors represent a majority in amount of such claims and it appearing that said composition is for the best interests of the creditors and that none of the bankrupts has been guilty of any of the acts or failed to perform any of the duties which would be a bar to his or their discharge and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises or acts contrary to the acts of Congress relating to bankruptcy and the consideration to be
93 paid by the bankrupts to their creditors and the money necessary to pay all debts having priority and the costs of the proceedings, having been deposited subject to the order of the Judges of this Court herein pursuant to an order entered on the 8th day of January 1915, and it further appearing that an order to show cause why such composition should not be confirmed has heretofore been made herein and due notice having been given as required by section 58a (2) of said bankruptcy act and on the return day of said order to show cause, to wit the 18th day of January 1915 the only creditors entering their appearance in opposition to the confirmation of said composition being J. C. White, O. G. Halliburton, C. H. Green and C. G. Kershaw, all appearing by Phelan Beale Esq., their attorney and specifications in writing of the grounds of the opposition of said creditors having been filed by said Phelan Beale Esq., on behalf of said creditors and the said objections having duly come on to be heard pursuant to stipulation and said Phelan Beale Esq., having been heard in support of said objections and after hearing Charles Pope Caldwell Esq., the attorney for said bankrupts (Albert B. Boardman Esq., of counsel) Thomas S. Fuller Esq., of counsel for Robert M. Thompson and Martin L. Stover Esq., Henry Wellman Esq., and David H. Miller Esq., of counsel for creditors; Robert Forsythe Little Esq., of counsel for the receivers herein and upon all the papers and proceedings heretofore had herein and on the proceedings had in Court on the 21st day of January 1915 including the statements made by counsel and by said receiver upon the argument and due consideration having been given thereon, and the Court being satisfied of the compliance with all of the particulars specified in said bankruptcy act,
94 Now on motion of Charles Pope Caldwell attorney for said bankrupts,

It is Ordered, Adjudged and Decreed that the said composition be and the same hereby is in all respects confirmed and the said offer of composition dated December 21, 1914 with Exhibits A, B, C, D and E annexed thereto are hereby made a part of this decree and it is further

Ordered, adjudged and Decreed that upon the filing herein by John W. Jay of the trust agreement, Exhibit "A" attached to said offer of composition, duly executed by him, the receivers herein, be and they hereby are directed to forthwith transfer and deliver to said John W. Jay all the assets and property of every name and nature of S. H. P. Pell & Company and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell individually and as co-

partners doing business under the firm name and style of S. H. P. Pell & Company which are or may come into the hands or under the control of said receivers or to which they may be entitled and said receivers and the bankrupts herein shall execute and deliver to said Jay, assignments and conveyances to said Jay, of all of the assets and property of S. H. P. Pell & Company, and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell individually and as copartners doing business under the firm name and style of S. H. P. Pell & Company and of all of the right, title and interest of S. H. P. Pell & Company and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell individually and as copartners doing business under the firm name and stye of S. H. P. Pell & Company in and to the same. Provided however that the receivers shall retain in their possession the sum of $100,000 in money for the payment of such fees and allowances as may be made by this Court herein, as
95 hereinafter provided and for the payment of all claims against S. H. P. Pell & Company if any, which are by law entitled to priority, and the balance if any, of said $100,000 not required for such purposes, shall after such payments are made, be paid by said receivers to said John W. Jay, and provided further that such property as is the subject of reclamation proceedings shall be held by said receivers subject to and pending the determination of such reclamation proceedings and the further order of this Court and upon the termination of such reclamation proceedings respectively, any such property then remaining in the hands of the receivers and not ordered by this Court to be delivered to divers claimants shall be delivered by said receivers to said Jay.

Nothing in said composition nor in this order contained, shall be construed so as to limit or so as to enlarge or extend the rights of any party to any reclamation proceedings herein, nor shall anything in said composition or in this order contained, be construed so as to reduce or limit or so as to extend or enlarge the time within which any reclamation proceeding may be brought herein, and it is further

Ordered, Adjudged and Decreed that it is for the best interests of the estate and of the creditors thereof that the settlement with Robert M. Thompson set forth in said offer of composition and the transfer of the property to him referred to in said offer, shall be made, and the property described and set forth in schedule "E" is hereby directed to be delivered to said Robert M. Thompson and upon the said Robert M. Thompson executing and delivering to the receivers a release of any and all claims which he may have against the bankrupts, against the receivers thereof, and the estates of S. H. P.
96 Pell & Company and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell and in all respects complying with the terms of the offer of composition on his part to be performed, and thereupon the said Robert M. Thompson, shall be relieved of any further liability to the said receivers or to the estate by reason of the order heretofore entered by this Court dated January 6, 1915 or otherwise and it is further

Ordered, Adjudged and Decreed that the distribution of the original certificates of participation in net proceeds of said assets shall be under the supervision of Peter B. Olney Esq. referee in charge of this proceeding and it is further

Ordered, Adjudged and Decreed that the said referee shall furnish to said John W. Jay trustee, a list of all the creditors entitled to receive said certificates with the amounts of the respective claims for which said certificates shall be issued which list shall be made up by the referee as follows:

(*a*) It shall include all claims duly filed with said referee on or prior to the date of this decree, to which no objections have been filed or shall be filed by any party in interest within twenty days from the date of this decree.

(*b*) It shall include all claims listed in the schedules of the bankrupts herein which have not been filed herein, and to which no objections have been or shall be duly filed by any party in interest within twenty days from the date of this decree.

(*c*) It shall contain a separate list of all claims filed herein to which objection has been or shall be duly filed by any party
97 in interest within twenty days from the date of this decree and of all scheduled claims not filed herein but to which objection has been filed within the period aforesaid.

There shall not be included in said list any scheduled claim which has been paid or discharged since the commencement of this proceeding under order of this Court or otherwise and any scheduled claim which may have been reduced in amount shall be included in said list only for the amount thereof as so reduced. The certificate of the receivers herein shall be accepted by said referee as sufficient evidence of any such payment or reduction in amount of any scheduled claim, for which no verified proof of claim has been filed.

Each creditor to whose claim objection has been or shall be filed as aforesaid within the period aforesaid shall be entitled to receive a certificate of participation for the amount at which the claim shall be finally allowed in this proceeding and in each case where the claim of the creditor is objected to only in part, such creditor shall be entitled to receive a certificate of participation for the amount of such claim which not objected to, pending and without prejudice to the final determination of the amount of the claim and to any right of such creditor to receive a further certificate upon such determination.

Any objections to claims may be brought on for hearing before the referee on three days' notice either to the claimant or by the claimant to the attorney causing the objection to be filed.

No creditor shall be entitled to receive a certificate or certificates of participation for an amount in excess of his claim against the bankrupt estate as finally determined, as hereinabove provided and objections may be filed to any claim by any party in interest.

98 It is further Ordered, Adjudged and Decreed that the bankrupts and the receivers herein are directed to execute any and all instruments that may be necessary to vest in the said John W. Jay, trustee all the right, title and interest of the said bankrupts or of the said receivers in any and all property and all claims in the possession of the receivers or to which they may be or become entitled, and it is further

Ordered, Adjudged and Decreed that the intervening petitions filed herein by Logan & Bryan and by Heineken & Vogelsang and others, shall be and they are hereby dismissed, and it is further

Ordered, Adjudged and Decreed that this Court will on the 9th day of February 1915 at 10.30 o'clock in the forenoon in the United States Post Office Building, fix the fees and allowances herein of the referee in bankruptcy, the receivers in bankruptcy, the attorneys for the receivers, the attorneys for the petitioning creditors, said intervening-petitioning creditors and the bankrupts; and it is further

Ordered, Adjudged and Decreed that the receivers the said John W. Jay, the trustee named in the said offer of composition and any party in interest herein may apply to this Court at the foot of this decree, for such other and further directions as to the Court may seem proper.

AUGUSTUS N. HAND,
U. S. District Judge.

January 25, 1915.

A true copy,
ALEX. GILCHRIST, JR.,
Clerk.

99 EXHIBIT 10.

Summons in South Carolina Action.

Court of Common Pleas, the State of South Carolina, County of Charleston.

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Copartners under the Firm-name of W. Gordon McCabe & Co., Plaintiffs,

against

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and Robert M. Thompson, Copartners under the Firm-name of S. H. P. Pell & Co., Defendants.

Copy Summons for Relief.

(Complaint Not Served.)

To the Defendants above named:

You are hereby summoned and required to answer the complaint in this action which will be filed in the office of the Clerk of the Court of Common Pleas for the said County, and to serve a copy of your answer to the said Complaint on the subscribers at their office No. 30 Broad Street, Charleston, South Carolina, within twenty days after the service thereof; exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid, the plaintiff in this action will apply to the Court for the relief demanded in the complaint.

Dated March 25th, A. D. 1918.

BUIST & BUIST,
Plaintiff's Attorneys.

100 EXHIBIT 11.

Complaint in South Carolina Action.

In the Court of Common Pleas, State of South Carolina, County of Charleston.

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Copartners under the Firm-name of W. Gordon McCabe & Co., Plaintiffs,

against

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and Robert M. Thompson, Copartners under the Firm-name of S. H. P. Pell & Co., Defendants.

Complaint.

To the Court of Common Pleas for the County of Charleston, in the Ninth Circuit:

The plaintiffs allege:

1. That at all the times hereinafter set out, the plaintiffs, W. Gordon McCabe, Jr., and William F. Gray, were and now are co-partners doing business under the firm name of W. Gordon McCabe & Co., as merchants carrying on a general cotton business for export and otherwise, with their principal place of business in the
101 City of Charleston, South Carolina.

2. That at the times hereinafter set out, the defendants, Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell, and Robert M. Thompson, were co-partners, doing business under the firm name of S. H. P. Pell & Co., as cotton brokers, and had their principal place of business in the City of New York, in the State of New York, and at all such times were members of the New York Cotton Exchange, a New York Corporation having its principal and only place of business in New York City.

3. That prior to the 24th day of December, 1913, plaintiffs employed defendants upon open account to buy and sell upon plaintiff's orders and subject to the by-laws, rules and regulations of the New York Cotton Exchange, certain cotton for future delivery upon said exchange for the account and risk of plaintiffs, and promised and agreed to pay defendants all sums advanced by defendants in the purchase thereof, and also commissions to defendants for the purchase and sale thereof.

4. That in the course of the employment of defendants by plaintiffs aforesaid, plaintiffs sent to defendants certain orders for the purchase and sale of cotton as aforesaid, which defendants agreed and promised to execute upon the said New York Cotton Exchange. That defendants not only neglected, failed and omitted so to execute the said orders, but falsely and fraudulently stated, reported and represented to plaintiffs that the said orders had been duly executed upon the said Exchange, and in accordance with the by-laws,

102 rules and regulations thereof, and falsely and fraudulently charged plaintiffs' account with such sums as would have been advanced by defendants and with such sums as would have been earned by defendants if said orders of plaintiffs had in fact been so executed by defendants as by them falsely, and fraudulently stated, reported and represented to plaintiffs.

5. That from time to time during said period said defendants rendered to plaintiffs various statements wherein defendants falsely and fraudulently charged plaintiffs with the purchase price of about One hundred and fifty-seven thousand (157,000) bales of cotton in the amount of approximately Ten Million, One hundred and Ninety-three Thousand, Nine Hundred and Ninety Dollars, ($10,193,-990.00), and by said statements falsely and fraudulently represented to plaintiffs such cotton to have been purchased by defendants for plaintiffs' account in accordance with plaintiffs' instructions and with the by-laws, rules and regulations of the said New York Cotton Exchange, and thereby falsely and fraudulently represented to plaintiffs that the amount of the purchase price thereof had been duly paid, laid out, and expended by defendants for and on account of plaintiffs, and that the amount of defendants' commissions charged to plaintiffs in said statements had been duly earned by defendants in and about the purchase and sale of the cotton so falsely represented to plaintiffs to have been purchased for their account and to be due and owing to defendants.

6. That plaintiffs relied on said notices, statements, reports, representations and statements of account, and believed them to be true and correct, until some time after July 1st, 1916.

103 7. That relying on the truth and correctness of such notices, statements, reports, representations and statements of accounts as aforesaid, plaintiffs, at various times prior to the 31st day of January, 1914, at the request and demand of defendants, paid to defendants various sums of money aggregating Six Hundred and Three Thousand, Sixteen Dollars and Fifty-two cents ($603,016.52).

8. That large amounts of said alleged purchases and sales of cotton were not in truth or in fact made by defendants, and that the sums of money charged in said statements of account represented alleged payments made by defendants on account of said alleged purchases of cotton as aforesaid, were not in truth or in fact paid, laid out or expended by defendants in or about the purchase of such cotton, and the commissions charged to plaintiffs therein had not been earned by defendants; and that defendants at all times knew that said alleged purchases and sales had not been made, and that the said notices, statements, reports, representations and statements of account made and rendered by defendants to plaintiffs as aforesaid were false and fraudulent at the times they were severally made.

9. That said false and fraudulent notices, statements, representations, and statements of account were made, rendered and delivered to plaintiffs by defendants with the intent to deceive plaintiffs, and for the purpose of inducing plaintiffs to make the various payments to defendants mentioned in paragraph "7" hereof; that said payments were so made by plaintiffs, solely because they relied upon the said Notices, reports, statements, representations and statements of

account of the defendants and upon the truth and correctness
104 thereof, and believed that said purchases and sales had in fact been made and that said sums of money had in fact been paid, laid out and expended; and that plaintiffs continued to so believe until after July 1, 1916.

10. That in all the negotiations, transactions and communications, oral and written, had between plaintiffs and defendants, prior to July 1, 1916, plaintiffs relied upon said notices, reports, statements and representations aforesaid and believed them to be true.

11. That the defendants herein acting as such agents for plaintiffs in the purchase and sale of cotton as aforesaid, owed a duty to plaintiffs to fully and frankly disclose to plaintiffs the facts with reference to all transactions made for and on account of plaintiffs; and that defendants in violation of said duty and in violation of the trust and confidence imposed in defendants by plaintiffs falsely and fraudulently represented to plaintiffs that they had purchased and sold certain cotton and had paid out certain sums of money as hereinbefore set forth.

12. That by reason of the foregoing false and fraudulent representations and conduct of defendants as aforesaid, plaintiffs have suffered damage in the sum of One Million Dollars, ($1,000,000).

13. Plaintiffs further allege by way of special damage that said false and fraudulent notices, reports, statements, representations and statements of account to plaintiffs by the defendants showed a large indebtedness due by the plaintiffs to the defendants which was not in fact due, said false claim of said indebtedness induced plain-
105 tiffs at various times prior to December 24th, 1913, to pay large sums of cash to defendants, which were not in truth due defendants, and created a condition at the latter part of December, 1913, which if true, would have made plaintiffs unable to meet their maturing obligations; that the said conditions so created as aforesaid by defendants forced plaintiffs as a direct proximate cause, to dispose of a large part of their holdings at a loss; that their credit thereby became impaired and they were unable to meet their said obligations, and so announced, and that they were instituted on or about the 27th day of December, 1913, in the United States District Court for the Eastern District of South Carolina, proceedings in bankruptcy against said plaintiffs, and plaintiffs were compelled to make settlement by compromise with a number of their New York creditors, including defendants, the said defendants fraudulently claiming to be creditors as aforesaid, in order to escape being adjudicated bankrupts; all to the special damage to plaintiffs of Five Hundred Thousand Dollars ($500,000.00).

14. On information and belief that defendants deny liability to plaintiffs to repay said aforesaid sums of money.

Wherefore, Plaintiffs demand judgment against defendants in the sum of One Million Five Hundred Thousand Dollars, ($1,500,000.00), together with their costs herein.

BUIST & BUIST,
Plaintiffs' Attorneys.

106 STATE OF SOUTH CAROLINA,
County of Charleston, ss:

William F. Gray, being duly sworn, deposes and says: that he is one of the plaintiffs in this action; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WILLIAM F. GRAY.

Sworn to before me, this First day of May, A. D. 1918.
[SEAL.] JULIAN V. BRANDT,
Notary Public for S. C.

Endorsed: U. S. District Court, S. D. of N. Y. Filed Sept. 13, 1918.

107 *Notice of Appearance.*

District Court of the United States for the Southern District of New York.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

For a Special Appearance.

Please take notice that the above-named defendants, W. Gordon McCabe, Jr., and William F. Gray, hereby appear by their attorney specially and for the sole and single purpose of objecting to the jurisdiction of this Honorable Court to entertain and proceed with this cause for any purpose whatsoever, and that each and every of the papers herein served and filed in this cause by and on behalf of the said defendants by their attorney is done under said objection to jurisdiction and protest against proceeding with this cause in any manner or form whatsoever.

Dated, New York, September 17th, 1918.

WILLIAM ST. JOHN TOZER,
Attorney for Defendants,
Appearing Specially as Above Set Forth,
42 Broadway, Borough of Manhattan,
New York City, New York.

To Myers & Goldsmith, Esqrs., Attorneys for Plaintiffs, 100 Broadway, Borough of Manhattan, New York City.

108 *Answer.*

District Court of the United States for the Southern District of New York.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

The defendants above named, hereby reserving their objections to the jurisdiction of this court, answering the complaint herein by William St. John Tozer, their solicitor,

I. Deny upon information and belief so much of the allegations of paragraph "1" of the complaint as allege that Robert M. Thompson was the special or limited partner of the said firm of S. H. P. Pell & Co.

II. Deny so much of the allegations of paragraph "2" of said complaint as allege that said defendants are engaged in business as cotton brokers and are members of the New York Cotton Exchange, under the firm name and style of W. Gordon McCabe & Co., and transact business at No. 60 Beaver Street, in the City of New York, within the Southern District of New York; and with respect thereto defendants allege that they are cotton commission merchants engaged in business in the City of Charleston, South Carolina,
109 where they reside; that the defendant W. Gordon McCabe is a member of the New York Cotton Exchange and they have an office at 60 Beaver Street, in the City of New York, to facilitate the transaction of a part of their business.

III. Deny on information and belief so much of paragraph "3" of said complaint as alleges that S. H. P. Pell & Co. made such purchases of cotton for future delivery on the New York Cotton Exchange pursuant to such employment and thereafter and on or about the 22nd and 23rd days of December, 1913, pursuant to the defendant's direction, S. H. P. Pell & Co. sold said cotton so purchased, and the difference between the amounts paid in the purchases and commission therefore and the amount realized upon the sale thereof was the sum of $114,457.67, and with respect thereto allege on information and belief that said S. H. P. Pell & Co. did not make such purchases and sales of cotton, but falsely and fraudently represented to defendants to have done so; and defendants deny upon information and belief that any amount of money whatever was paid out by S. H. P. Pell & Co. on account of said alleged purchases.

IV. Defendants deny each and every of the allegations contained in paragraph "4" of said complaint as fully as if the same were here at length set forth and denied except they admit they paid plaintiffs the sum of $22,691.53 in January, 1914, but defendants deny that the said payment of $22,691.53 was on account of said alleged indebtedness and that after said payment there was left due and

owing to said S. H. P. Pell & Co. on January 15, 1914, a balance of $91,566.14; and defendants further deny that there was any balance or any sum due said S. H. P. Pell & Co. on said alleged in-
110 debtedness on January 15th, 1914, or at any time before or at any time thereafter and defendants allege that said payment of $22,691.53 was paid by defendants and received by said S. H. P. Pell & Co. in full settlement for all indebtedness due or alleged to be due said S. H. P. Pell & Co. from defendants and defendants further allege on information and belief that no part of said indebtedness alleged in paragraph "4" of said complaint was at any time due said S. H. P. Pell & Co. from these defendants; but that in fact said Pell & Co. was indebted to defendants in a large amount for money fraudulently obtained by said S. H. P. Pell & Co. from defendants; which latter fact was not then known to defendants and only became known to defendants subsequent to June, 1916.

V. Defendants say that they have no knowledge as to the matters alleged in paragraph "7" of the complaint.

VI. Defendants deny so much of the allegations of paragraph "9" of the complaint as alleges that the said Receivers demanded payment of a claim due from the said defendants to the bankruptcy estate amounting to the sum of $91,467.57, and deny that said Receivers at any time demanded payment of said sum or of any sum other than the sum of $261.52, which defendants admit they paid; and defendants allege that they had certain correspondence with said Receivers in which said Receivers acknowledged that said alleged claim for $91,467.57 was not a legal obligation and was not enforceable.

VII. Defendants admit that they knew of the institution of
111 bankruptcy proceedings against said S. H. P. Pell & Co.; but deny the allegations contained in paragraph "10" of the complaint that they "had full and complete knowledge and notice of the maintenance and disposition of the said bankruptcy proceedings and the orders and decrees therein made from about the time of the inception thereof down to and including the final disposition thereof and with reference thereto, defendants allege that they were scheduled by said bankrupts as a debtor and not as a creditor, and that defendants did not know that they had been defrauded by said S. H. P. Pell & Co. until June, 1916, long after the bankruptcy proceedings mentioned in the complaint.

VIII. Defendants say that they have no knowledge as to the allegations contained in paragraph "12" of the complaint; and defendants allege with reference thereto on information and belief that said Thompson claimed to be a creditor of said S. H. P. Pell & Co. in a large amount and that said Thompson was endeavoring to realize as much as possible on account of his alleged claim.

IX. Defendants allege that they have no knowledge as to the allegations contained in paragraph "13" of the complaint; and with reference thereto defendants admit that they are informed and believe that Exhibit 5 to the complaint is a copy of a portion of said schedules, that said bankrupts, Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell submitted a proposed offer of composition

to their creditors and that Exhibit 6 to the complaint is a copy of said offer to composition.

X. Defendants say that they have no knowledge as to the allegations contained in paragraph "14" of said complaint.

112 XI. Defendants say that they have no knowledge as to the allegations contained in paragraph "15" of the complaint.

XII. Defendants say that they have no knowledge as to the allegations contained in paragraph "16" of the complaint; but with reference thereto they admit that they are informed and believe that an order was entered confirming the offer of composition, which is Exhibit 6 to the complaint, and that Exhibit 9 to the complaint is a copy of said order.

XIV. Defendants deny each and every of the allegations contained in paragraph "21" of the complaint as fully as if said allegations were here at length set forth and denied, except that they admit that said order would have full force and effect as a discharge of provable debts against S. H. P. Pell, Charles A. Kittle and Howland H. Pell as far as it purports to be such a discharge.

XV. Defendants deny the allegations contained in paragraph "22" of the complaint that the transfer there mentioned included the claims there set forth and described in sub-divisions "1," "2" and "3" of said paragraph as fully as if said allegations were here at length set forth and denied, and defendants deny that there was any claim of any nature or any amount against them in favor of S. H. P. Pell & Co., and that none was transferred to said trustee; and defendants say that they have no knowledge as to the remaining allegations of said paragraph.

XVI. Defendants deny each and every of the allegations contained in paragraph "25" of the complaint as fully as if the same

113 were here at length set forth and denied; and with reference thereto defendants allege that the claims upon which the action mentioned in the complaint was brought against the plaintiffs were not provable in said bankruptcy proceedings.

XVII. Defendants deny so much of the allegations contained in paragraph "26" of the complaint as alleges that the action therein mentioned was based upon the transactions mentioned in paragraphs "3," "4" and "23" of the complaint, except that they admit some of said transactions are the same as those mentioned in the portion of the answer quoted in paragraph "23" of the complaint, and they further deny the allegations of said paragraph "26' that said cause of action is a "pretended cause of action."

XVIII. Defendants deny each and every allegation contained in paragraph "27" of said complaint as fully as if the same were here at length set forth and denied.

XIX. Defendants deny each and every allegation contained in paragraph "28" of said complaint as fully as if the same were here at length set forth and denied.

XX. Defendants deny each and every allegation contained in paragraph "29" of said complaint as fully as if the same were here at length set forth and denied, except defendants admit that the plaintiff, Robert M. Thompson, was the only one of the plaintiffs

herein served with process in the action in South Carolina, in said State Court, that said Thompson appeared and caused said action to be removed to the District Court of the United States for the Eastern District of South Carolina, wherein the action is now pend-
114 ing, and with reference thereto defendants allege that Robert M. Thompson, Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell have all appeared and answered in said action in the said United States District Court for the Eastern District of South Carolina.

XXI. Defendants say that they have no knowledge as to the allegations contained in paragraphs "30" and "31" of the complaint.

XXII. Defendants deny each and every of the allegations contained in the second paragraph numbered "31" in said complaint, and with reference thereto, allege that the plaintiffs have a full and adequate remedy at law and have already set up in their answers in said action pending in the United States District Court for the Eastern District of South Carolina, all of the facts with reference to said Bankruptcy Proceedings; and that plaintiffs in that Court and in that action can and will obtain full justice and any and all relief to which they may be entitled either in law or in equity.

For a Separate Defense and Plea.

XXIII. Defendants here repeat and reiterate the denials contained in paragraphs I to XXII hereof inclusive as fully as if here set forth at length.

XXIV. Defendants allege that their cause of action in the action here sought to be enjoined, the complaint in which action is attached to the complaint herein as Exhibit 11, based on fraud and deceit and is of such a nature, as appears from such complaint,
115 Exhibit 11, that it would not have been a provable claim in bankruptcy had defendants known of said fraud and deceit and of the facts of said claim in time to have asserted it in the Bankruptcy Proceedings, and that the defendants did not know said facts until subsequent to June, 1916, and long after the Bankruptcy Proceedings mentioned in the complaint herein.

For a Separate Defense and Plea.

XXV. For answer in lieu of plea to the complaint defendants say that a part of the claim set up in the action now sought to be enjoined was set up by defendants in answer to an action brought in 1916 against defendants by the trustee for these plaintiffs, and not only did plaintiffs and the trustee acting for their benefit fail to seek the relief now sought; but on the contrary, the plaintiff in that action objected to the removal of that action to this Court, and caused the same to be remanded to the State Court on the ground that this Court did not have jurisdiction.

Answer in Lieu of Demurrer.

XXVI. For answer in lieu of demurrer to the complaint herein, defendants say that plaintiffs have not in or by their said complaint made or stated such a case as entitles them in a court of equity to any discovery or relief as to the matters contained in said complaint or any of such matters, and for special ground of demurrer defendants say that it appears from the plaintiffs' complaint that this Court has no jurisdiction of the parties or of the subject matter of this suit either as an original action or as an ancillary suit, and that it appears on the face of the complaint that no cause of action exists in favor of these plaintiffs for the relief prayed for, or for any relief from this Court.

116 Wherefore defendants pray that the complaint herein be dismissed and that they have judgment for their costs and disbursements herein.

WILLIAM ST. JOHN TOZER,
Solicitor for Defendants,
Office & P. O. Address, 42 Broadway,
Borough of Manhattan,
New York City.

STATE OF NEW YORK,
County of New York, ss.:

William St. John Tozer, being duly sworn, says that he is attorney and solicitor for the defendants herein; that he has read the foregoing answer and knows the contents thereof and that the same is true to his knowledge, except as to the matters therein stated to be upon information and belief, and that as to those matters he believes it to be true; that the reason deponent verifies this answer is that both of defendants are without the State of New York; and that the sources of deponent's information and the grounds of his belief as to matters not stated upon his knowledge are conversations had with defendants and deponent's connection as counsel for creditors with the Bankruptcy Proceedings of S. H. P. Pell & Co. as counsel for defendants in the actions mentioned in the complaint and

117 papers and documents now in possession of deponent.

WILLIAM ST. JOHN TOZER.

Sworn to and subscribed before me this 3rd day of October, 1918.
[SEAL.] J. L. LEITHEAD,
Notary Public, New York County, No. 257.
New York Register's No. 9152.

My Commission expires March 30, 1919.

118 *Notice of Motion.*

United States District Court for the Southern District of New York.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

Please take notice that upon the complaint herein and the answer of the defendants thereto, the undersigned will move this Court on Monday, October 14th, 1918, at the opening of Court on that day or as soon thereafter as counsel can be heard for an order calling up and disposing of the issues of law raised by the separate defenses in the answer of the defendants, and for judgment on the pleadings herein dismissing the complaint on the grounds specified in paragraph "26" of said answer, and for a further order, that the trial of the issues of fact raised by said answer be adjourned until after the disposition of the issues of law raised in said answer, and for such other and further relief in the premises as may be just.

Dated, New York, October 8th, 1918.

WILLIAM ST. JOHN TOZER,
Solicitor for Defendants,
Appearing Specially, etc.,
42 *Broadway, Borough of Manhattan,*
New York City.

119 *Order Dismissing Bill.*

At a Stated Term of the District Court of the United States for the Southern District of New York, Held in the United States Courthouse, in the Post-office Building, Borough of Manhattan, City of New York, on the 23rd day of October, 1918.

Present: Honorable Learned Hand, District Judge.

E 15—222.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

Decree.

This cause having duly come on to be heard upon a motion made by the defendants herein for judgment on the pleadings upon the grounds of demurrer set up in the answer herein, and said motion

having been duly argued by William St. John Tozer, Esq., of counsel for defendants, and Emanuel J. Myers, Esq., of counsel for plaintiffs, and due consideration having been had, it is

Ordered, adjudged and decreed: That the complaint herein be and the same hereby is dismissed, with costs to the defendants to be taxed.

LEARNED HAND,
U. S. D. J.

120 *Assignment of Errors.*

United States District Court, Southern District of New York.

E 15—222.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

And now come the plaintiffs above named, by Myers & Goldsmith, their solicitors, and respectfully make and file the following assignment of errors in this Court, to wit:

1. The said District Court erred in ordering, adjudging and decreeing that the plaintiffs were not entitled to injunctive relief and the prayer therefor be denied.

2. The said District Court erred in ordering, adjudging and decreeing that the bill of complaint herein be dismissed, with costs to defendants.

3. The said District Court erred in holding and ruling, as indicated in and by its opinion and order and judgment, that a motion to restrain the action at law mentioned and described in the bill of complaint herein would not lie, and in granting the said motion for judgment in favor of the defendants and against the plaintiffs.

121 4. The said District Court erred in holding and ruling, as indicated in and by its opinion and order and judgment, that there were not sufficient facts set forth in the bill of complaint herein entitling the plaintiffs to relief in equity as prayed for in the bill of complaint.

5. The said District Court erred in not granting a final decree herein in favor of plaintiffs pursuant to the prayer in the bill of complaint herein, because of the insufficiency of the defenses set forth in the answer.

Dated, New York, October 24, 1918.

MYERS & GOLDSMITH,
Solicitors for Plaintiffs.

Office and Post Office Address, No. 100 Broadway, Borough of Manhattan, City of New York.

122 *Petition for Allowance of Appeal and Order.*

United States District Court, Southern District of New York.

E 15—222.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

The plaintiffs above named, considering themselves aggrieved by the decree of this Court made and entered herein on the 23rd day of October, 1918, do hereby appeal from said decree and from the decision upon which the same is based to the United States Circuit Court of Appeals for the Second Circuit for the reasons set forth in the assignment of errors filed herewith, and pray that their appeal be allowed, and that a citation be issued as provided by law directed to the above-named defendants commanding them to appear before said Circuit Court of Appeals to do and receive what may pertain to justice to be done in the premises, and that a transcript of the record, proceedings, affidavits, exhibits and papers upon which said decree was made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Second Circuit under the rules of said Court in such cases made and provided, and that said decree may be reversed by said Court of Appeals, and that the relief primarily
123 and finally prayed for in the bill of complaint herein be granted.

And your petitioners further pray that the restraining order heretofore granted in this cause by order entered on the 23rd day of September, 1918, and signed by Honorable Charles M. Hough, United States Circuit Judge, be continued in force in all respects during the pendency of the appeal herein prayed for upon such terms as the Court may deem proper.

And your petitioners offer herewith the bond required by law upon the allowance of this appeal.

Dated, October 24th, 1918.

MYERS & GOLDSMITH,
Solicitors for Plaintiffs.

EMANUEL J. MYERS,
Counsel.

And now, to wit, on the 24th day of October, 1918, on presentation and consideration of the foregoing petition, it is

Ordered, that the said appeal be allowed as prayed for upon plaintiffs giving bond as required by law in the sum of Two hundred and fifty ($250.00) Dollars, and that bond for said sum submitted by plaintiffs with said petition be and the same hereby is in all respects approved.

Dated, October 24th, 1918.

LEARNED HAND, *D. J.*

124 *Bond on Appeal Filed October 24th, 1918.*

Charles A. Kittle and others, as principals, and United States Fidelity & Guaranty Co., as surety, duly executed and filed herein on October 24th, 1918, their bond in the sum of $250, conditioned upon the prosecution by plaintiffs of their appeal, which is here omitted by consent.

Opinion of Hon. Learned Hand, D. J.

United States District Court, Southern District of New York.

STEPHEN H. P. PELL et al.

against

W. GORDON MCCABE, JR., et al.

Emanuel J. Myers, for the Plaintiffs.
William St. John Tozer, for the Defendants.

LEARNED HAND, *D. J.*.

This complicated bill of complaint raises a number of questions which I do not find it necessary to determine. For example, had the bankruptcy court any jurisdiction whatever in the order of composition to do more as to Thompson than to settle his claims against the estate? If it had such jurisdiction, did it attempt to exercise it quoad, Thompson's creditors, who did not formally accept the composition? Could a composition in any case affect the rights of creditors of Thompson, who was not a bankrupt, who offered no
125 composition and whose creditors were not before the court? If so, could it affect creditors not mentioned in the schedules, who did not know of the existence of their claims, because they had not yet discovered a fraud practised upon them by the bankrupts and Thompson? These questions all go to the effect of the order or decree of January 25, 1915, and as in the view I take that order must be pleaded in bar in South Carolina, it is obviously more orderly to avoid any discussion of them beyond the caution that my silence must not be taken as intimating that I should answer any one of them in the plaintiffs' favor. Similarly, I pass the question whether this bill is within the ancillary jurisdiction of a court of bankruptcy or of the District Court as ancillary to the court of bankruptcy.

That the bill cannot succeed as to the bankrupts is too clear to justify discussion. They got a discharge under the order of confirmation and that discharge is a bar to certain of their debts, under Section seventeen. The power of bankruptcy courts to stay suits brought against the bankrupt on dischargeable debts is regulated by section 11-a and is expressly confined to a period up to the determination of the discharge proceedings, Re Federal Biscuit Co., 214 Fed. R., 221, 225. By no "auxiliary" bill dependent upon the bankruptcy proceedings does the District Court get a wider power to stay

suits in a State court than it would have had as a court of bankruptcy. Indeed, I do not understand that the plaintiffs so contend. As to the bankrupts the bill must in any event be dismissed.

As to Thompson, the position, if I understand it, is this: The bankruptcy court having jurisdiction to release Thompson of his debts, undertook to do so. That release being an adjudica-
126 tion, is property, property within the jurisdiction of the court, and the court by ancillary bill will protect it from attack elsewhere by injunction. As I have said, I shall treat the order as though it effectively released Thompson from such a claim as that set up in the South Carolina action. The first question is whether a judgment releasing a debtor can be the basis of a subsequent suit to enjoin the debt. That, I take it, is at most only one form of the general question whether the plaintiff has an adequate remedy at law. I do not mean that it presents the case as strongly as where there has been a judgment upon a claim sued on and a merger, but only that it is no better for the plaintiff than such a situation. Normally, when any defense is available at law, he must plead it there (Grand Chute v. Winegar, 15 Wall., 373), and this applies as well to the defense of discharge of the liability as to any other defense (Fowler v. Palmer, 62 N. Y., 533; Saunders v. Huntington, 166 Mass., 96). The same rule generally applies when the defense is of merger or estoppel by judgment (Chicago etc. Co. v. Chicago, 143 Ill., 641, 647; Palmer v. Hayes, 93 Ind., 189; Gray v. Coan, 36 Iowa, 296; Bowen v. Gent, 54 Md., 556; B. & O. R. R. Co. v. Latimer, 118 Md., 183; Chicago etc. Co. v. St. Joseph etc. Co., 92 Fed. R. 22, 26). Now it is of course true that the right to plead in bar may not be sufficient; so much was indicated in Foltz v. St. Louis etc. R. Co., 60 Fed. R., 316, 322, where the point was not raised in time. Field v. Early, 167 Mass., 449, partook of the nature of an interpleader.

A bill quia timet is in this last category, and the plaintiffs seem to suppose that this is such, but a bill quia timet is a very limited affair. It goes to protect an existing possession which has been already established once after an attack at law and which is
127 again threatened. In such a case there is threatened such a multiplicity of suits as equity will recognize. Here there has never been any suit at all between the parties; at best the defendants are concluded by some kind of vague constructive consent, or whatever it may be. There is no property in possession of the plaintiffs, whose title has already been assailed and defended; there is no threatened repetition of any issues ever litigated before. It escapes me upon what possible theory it is supposed that bills quia timet are pertinent.

The same observations apply to those other cases cited in quantity under which courts have protected property once in their custody from becoming the subject of litigation elsewhere. It is not necessary to consider them in detail for they are endless, but they all rest upon the custody, actual or prospective, of a court. Now a release is not property, and if it were it would not under these circumstances be property of which the court has taken custody for the purpose of distribution. The mere statement of the supposed analogy shows how remote it is. Whatever rights Thompson got, were to be used like a

discharge, wherever he was sued. There is no possible reason why his supposed release should stand upon any different footing from the discharge in bankruptcy. And there is no escape from the conclusion that if this court draw to itself under the guise of an ancillary jurisdiction every litigation wherever it occurs which may be commenced against Thompson, the bankruptcy proceedings can never come to a conclusion.

Seeing no ground for equitable intervention, even if all be true that the plaintiffs allege, it follows that the bill is without equity, and as such it will be dismissed, with costs.

October 21, 1918.

LEARNED HAND, *D. J.*

128 *Opinion of Hon. Charles Merritt Hough, Circuit Judge.*

District Court of the United States for the Southern District of New York.

E 15—222.

STEPHEN H. P. PELL et al., Plaintiffs,

against

W. GORDON MCCABE, JR., and Another, Defendants.

On oral argument I did not sufficiently consider if I was aware that defendants appear only specially. Under such an appearance, which is only (strictly) permissible by leave of Court, a defendant can raise only a jurisdictional question—though if that point be overruled, he may contest the merits—having saved an exception.

As a true bill resting in diversity of citizenship the action is not sustainable. That is admitted.

As an endeavor to stay a suit against a discharged bankrupt it is also not sustainable. But as an endeavor to restrain a defendant who was party or privy to a decree in bankruptcy there is jurisdiction to entertain suit. Whether the decree or order holding in substance that Thompson was not a general partner was within the power of this Court to make, or whether properly construed, any such holding is contained in the decree, is a question which I am inclined to think defendants cannot raise under a special appearance—and which at all events has enough in it to entitle plaintiffs to a full trial.

129 Therefore, the injunction is continued in the same security, and the cause set for trial on the second Monday of October at the head of the Equity Calendar for that day, if before that time defendants appear and answer, or make such motion as may be the equivalent of a demurrer, saving their rights to the jurisdictional question sought to be raised under special appearance.

If defendants are ready to proceed to trial on the day thus fixed, and plaintiffs are not, then, unless otherwise ordered by the judge holding the Equity Session, the injunction hereby continued, granted or allowed shall immediately terminate and be no longer of effect.

If defendants are ready to proceed to trial on the day thus fixed, If defendants are not ready to proceed to trial as above indicated, the injunction will continue unless and until vacated or modified by a judge of this Court, or a judge duly authorized to hold this Court.
Sept. 19, 1918.

C. M. HOUGH,
U. S. D. J.

130 *Stipulation.*

United States District Court, Southern District of New York.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties, except the opinion of Judge Hough which defendants contend is not properly a part of this record.
Dated, November 8th, 1918.

MYERS & GOLDSMITH,
Attorneys for Plaintiffs-Appellants.
W. ST. JOHN TOZER,
Attorney for Defendants-Appellees.

131 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss.:

STEPHEN H. P. PELL and Others, Plaintiffs,

against

W. GORDON MCCABE, JR., and Another, Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.
In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 9th day of November, in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the said United States the one hundred and forty-third.

ALEXANDER GILCHRIST,
Clerk.

132 United States Circuit Court of Appeals, for the Second Circuit, October Term, 1918.

No. 136.

Argued December 2, 1918. Decided January 30, 1919.

Appeal from the District Court of the United States for the Southern District of New York.

Before Ward and Rogers, Circuit Judges, and Knox, District Judge.

STEPHEN H. P. PELL, et al., Plaintiffs-Appellants.

v.

W. GORDON MCCABE, JR., and Another, Defendants-Appellees.

Myers & Goldsmith, Attorneys for Appellants;
Emanuel J. Myers, Gordon S. P. Kleeberg, Counsel.
William St. John Tozer, Solicitor for Appellees;
William St. John Tozer, of Counsel.

This case comes here on appeal from the United States District Court for the Southern District of New York.

This suit is brought by plaintiffs for the purpose of enjoining the defendants from proceeding in an action now pending in the United States District Court for the Eastern District of South Carolina, so far as it proceeds against Robert M. Thompson as a general
133 partner of S. H. P. Pell and Company upon any claim which was provable in bankruptcy. It also seeks to enjoin the defendants from continuing that action in South Carolina or instituting any other action upon transactions between defendants and plaintiffs, or upon the plaintiffs' fraud in said dealings which was not at the time known to defendants. And it further seeks to enjoin defendants from attacking, questioning or challenging the power and jurisdiction of the United States District Court for the Southern District of New York to make certain orders to which reference is hereinafter made.

The South Carolina suit is for the recovery of moneys said to have been obtained from the plaintiffs by the defendants by fraud and deceit.

Neither plaintiffs nor defendants reside within the Southern District of New York.

The plaintiffs were members of the firm of S. H. P. Pell and Company, cotton brokers on the New York Cotton Exchange. The defendants are residents of South Carolina who prior to December 23, 1912, employed the brokers mentioned to buy and sell cotton on their behalf on the New York Cotton Exchange.

The plaintiffs contend that by reason of certain proceedings had in the United States District Court for the Southern District of New

York in the Bankruptcy proceedings of S. H. P. Pell and Company these defendants cannot maintain an action in South Carolina or anywhere against these plaintiffs and that they should be enjoined from doing so.

The facts with reference to those bankruptcy proceedings are as follows:

On July 31, 1914, S. H. P. Pell and Company, New York Cotton Exchange Brokers made a general assignment for the benefit of creditors.

On August 3, 1914, an involuntary petition in bankruptcy was filed by three creditors having provable claims exceeding $500 in the District Court for the Southern District of New York to have the firm of S. H. P. Pell and Company, Charles A. Kittle, and Howland H. Pell, individually, composing the said firm, adjudicated involuntary bankrupts. Robert M. Thompson was not made a party by
134 that petition. S. H. P. Pell and Company was, however, a limited partnership formed under the laws of the State of New York. The firm consisted of the two Pells above named and Kittle as general partners, and Robert M. Thompson as a special partner.

Receivers in bankruptcy were appointed who immediately qualified. When they took possession of the assets of the firm they found among them a large amount of securities and stocks which were claimed to be the individual property of Robert M. Thompson.

On October 2, 1914, the alleged bankrupts filed schedules in which was set forth the indebtedness of S. H. P. Pell and Company to Robert M. Thompson in the sum of $3,373,082.30, and that defendants were debtors in the sum of $261.52.

On October 19th of the same year the receivers of S. H. P. Pell and Company notified the defendants that they were scheduled as debtors in the schedules filed in the Bankruptcy Court for the sum of $261.52, and on the same day further demanded payment from the defendants of a claim for $91,467.57 in favor of the bankrupts. Pell and Company had, prior to December, 1913, acted as cotton brokers on the New York Cotton Exchange and claimed that the defendants owed them $91,467.57 and $261.52.

On November 21, of the year aforesaid, the defendants remitted to the receivers the sum of $261.52 being the amount previously demanded.

And on November 23 and 28 of that year petitions were filed in the bankruptcy proceedings which prayed that Robert M. Thompson be made a party to those proceedings and adjudicated a general partner and a bankrupt.

Negotiations were had at this time between the bankruptcy receivers, the New York Cotton Exchange, Robert M. Thompson and the bankrupts (firm and individuals) for:

"(1) The adjustment and settlement of the claims of the New York Cotton Exchange creditors, aggregating over $2,000,000.
135 (2) The threatened sale of certain securities loaned by Robert M. Thompson to the bankrupt firm and large deficiency and the assumption by Robert M. Thompson of certain firm

liabilities aggregating $2,100,000 and his agreement to hold the bankrupt estate harmless.

(3) The withdrawal of the scheduled claim of Robert M. Thompson against the bankrupt estate for $3,373,082.50, and the release of the bankrupt estate therefrom.

(4) The settlement of all questions and disputes with release and discharge of Robert M. Thompson and the dismissal of the intervening petitions against Robert M. Thompson."

The result was a plan of settlement in pursuance of which the bankrupts made an offer of compromise and composition which contained the following provisions concerning Robert M. Thompson:

"First. This offer is made in consideration of the discharge of the bankrupts, Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, from their debts, both individual and partnership, and of the release of Robert M. Thompson from any and all liability to said S. H. P. Pell & Co., and from any and all liability to any creditor of S. H. P. Pell & Co.

Ninth. Each and every creditor of S. H. P. Pell & Co. who shall assent to this offer of composition shall, upon the final confirmation of such composition by the Court, be deemed conclusively by his said assent thereto to have released Robert M. Thompson of and from any and all liability to such creditor on account of any connection of said Robert M. Thompson with S. H. P. Pell & Co. or any transaction of said Robert M. Thompson by or through S. H. P. Pell & Co.

136 Twelfth. It shall be adjudged herein * * *. There be no liability to said Thompson on the part of the Estate of S. H. P. Pell & Co. by reason of any rights or claims of any person * * * *

Fourteenth. The intervening petitions herein of Logan and Bryan and of Heineken and Vogelsang, et al., shall be dismissed, without costs."

The intervening petitions above referred to which were to be dismissed were those asking to have Thompson declared a general partner of S. H. P. Pell & Co. and adjudicated a bankrupt.

The Bankruptcy Court by formal order on January 25, 1915, confirmed the proposed compromise and offer of composition which had previously received the consent in writing of more than a majority in number and ninety per cent in amount of the creditors.

It is not denied that Robert M. Thompson duly carried out and performed all the terms of the agreement of compromise and the order of confirmation of January 25, 1915. And thereafter and in accordance with the order of confirmation aforesaid the bankrupts and the bankruptcy receivers conveyed all the bankrupt estate to John W. Jay who thereafter duly transferred it to the Guaranty Trust Company as substituted trustee for the bankrupt estate.

On June 16, 1916, the Guaranty Trust Company began an action in the United States District Court for the Southern District of New York against the defendants herein to recover the sum of $91,467.57, alleged to be due from defendants to the firm of S. H. P. Pell & Co., on account of transactions conducted by that firm on the New York Exchange as the defendants' brokers.

On March 29, 1918, the defendants began an action in the Court of Common Pleas for the County of Charleston in the State of South Carolina, wherein the defendants resided, against the firm of S. H. P. Pell & Co., alleged to be formed of Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell, and Robert M. Thompson to recover
137 $1,500,000 damages for fraud perpetrated in and arising out of transactions had by the defendants with S. H. P. Pell & Co., while that firm was acting as their brokers in transactions on the New York Cotton Exchange. The liability of Robert M. Thompson in said action is placed on the ground of his being a general partner.

Robert M. Thompson, one of the plaintiffs herein, and who was the only defendant served with process in the South Carolina action, caused the action to be removed from the State Court into the United States District Court wherein it was understood to be pending when this case was argued in this court, and wherein so far as we are informed it is still pending.

In the suit, now under review in this court, the court below dismissed the bill.

ROGERS, *Circuit Judge* (after stating the above facts):

Inasmuch as it appears that neither the plaintiffs nor the defendants reside within the Southern District of New York the court below clearly was without jurisdiction of the suit, now under review, as an original action. But it is said that this suit is not brought as an original suit but as a dependent and ancillary suit which has direct reference to a matter already litigated in the bankruptcy proceedings in the District Court for the Southern District of New York relating to the firm of S. H. P. Pell & Co. and the several persons alleged to constitute that firm.

In Street's Federal Equity Practice, vol. 2, sec. 1229, that writer says: "It is a rule, subject to but one exception, that jurisdiction in an ancillary proceeding is supported by the jurisdiction of the court in the main, or principal cause. Hence the ordinary jurisdictional averments may be dispensed with in such a proceeding. If a court has jurisdiction of the principal suit, it also has jurisdiction of any ancillary proceeding in that suit. Neither the citizenship of the parties, nor the amount in controversy, nor any other factor that would ordinarily determine jurisdiction, has any bearing on the right of the court to entertain that proceeding."
138 The one exception above referred to relates to an ancillary receivership and with that we are not now concerned. The right of a Federal court to sustain jurisdiction of an ancillary suit without reference to the citizenship of the parties was fully considered in Krippendorf v. Hyde, 110 U. S., 276, which reviewed the authorities. And see Pacific Railroad of Missouri v. Missouri Pacific Railway Co., 111 U. S., 505; Johnson v. Christian, 125 U. S., 642, 645; Carey v. Houston & Texas Central Ry. Co., 161 U. S., 115; Eichel v. United States Fidelity & Guaranty Co., 245 U. S., 102, 104.

The jurisdiction of a court over a particular subject matter and that court's power to apply a remedy no doubt are co-extensive. So that demands which are ancillary to the main action may be taken

cognizance of by the court and determined in aid of its authority over the principal matter. And a court may entertain proceedings ancillary to its judgment or decree for the jurisdiction it originally acquired is not exhausted by the entry of the judgment and the power is still in the court to issue all proper process and take all proper proceedings for the enforcement of its judgment. All this is familiar doctrine and well established law.

An ancillary suit may be maintained:

1. To aid, enjoin or regulate the original suit.
2. To restrain, avoid, explain or enforce the judgment or decree entered in the original suit.
3. To enforce or adjudicate liens or claims to property in the custody of the court in the original suit.
4. To prevent the relitigation in other courts of the issues heard and adjudged in the original suit, and to protect the titles and rights acquired under its judgment or decree from attack based on the theory that the adjudication in the original suit was illegal or ineffective.

139 Riversale Cotton Mills v. Alabama & Georgia Manuf. Company, 198 U. S., 188; Julian v. Central Trust Co., 193 U. S., 93, 112, 113; Carey v. Houston & Texas Ry. Co., 161 U. S., 115, 126, 127; St. Louis & San Francisco Ry. Co. v. M'Elvain, 253 Fed., 123, 128. In Bates on Federal Equity Procedure, vol. 1, sec. 97, the doctrine is summarized as follows:

"A bill filed to continue a former litigation in the same court, or which relates to some matter already partly litigated in the same court, or which is an addition to a former litigation in the same court, by the same parties or their representatives standing in the same interest, or to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties, standing in the same interest, or to prevent a party from using the proceedings and judgment of the same court for fraudulent purposes or to restrain a party from using a judgment to perpetrate an injustice, or obtain an inequitable advantage over other parties to the former judgment or proceeding, or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court, or to assert any claim, right or title to property in the custody of the court, or for the defense of any property rights, or the collection of assets of any estate being administered by the court, is an ancillary suit."

We do not question but that the District Court for the Southern District of New York may enforce and protect its jurisdiction as a Court of Bankruptcy when appealed to by a supplementary or ancillary bill to enforce its orders, sustain its jurisdiction and protect parties in the enjoyment of rights secured to them under its orders. This is so not only where jurisdiction is reserved or still retained but even afterwards where the result would be a relitigation of the same subject matter between the same parties. In re Swofford, 130 Fed., 549.

But the difficulty with the maintenance of this suit is that it cannot be regarded as in any proper sense an ancillary suit. It was instituted upon the theory that the proceedings in the District
140 Court for the Southern District of New York in the bankruptcy matter of S. H. P. Pell, & Co. discharged Stephen H. P. Pell & Co. as a firm and Stephen H. Pell, Charles A. Kittle and Howland H. Pell individually from all claims against the firm of S. H. P. Pell & Co., but that it also discharged therefrom Robert M. Thompson. But this is to lose sight of the terms of the composition which provided for the release of Thompson "from any and all liability to any creditor of S. H. P. Pell & Co. who shall assent hereto, on account of any connection of said Robert M. Thompson with said firm or any transaction of said Robert M. Thompson by or through said firm."

The release of Thompson was to apply only to those who specifically assented thereto. And there is no allegation anywhere in the complaint in the present action that the defendants herein assented to the composition. An examination of the record of the former proceedings shows that Thompson was not adjudicated a bankrupt, never filed schedules and never made any offer of composition. The offer of composition was an offer made by the two Pells and Kittle. Moreover, Thompson could not have offered a composition as section 12 of the Bankruptcy Act expressly provides that a bankrupt shall not offer terms of composition "before he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and lists of his creditors, required to be filed by bankrupts * * *."

An examination of the offer of composition made by the Pells and Kittle, and of the order confirming the same discloses that in neither is any reference made to the question whether Thompson was a member of the firm of S. H. P. Pell & Co. as a general or special partner. There was no adjudication of that question in that proceeding. There was no adjudication in that proceeding on the subject matter involved in the South Carolina action. And if the defendants here had appeared in that proceeding and opposed the composition, which they did not, they could not be enjoined from suing in another court. Friend v. Talcott, 228 U. S., 27. In the case cited the court holds that a creditor who had unsuccessfully opposed
141 a composition and a discharge in bankruptcy on the ground of fraud in creating the debt and accepted a dividend and who then sued for the balance on the ground that the debt was excepted from the discharge had not waived his right to sue on the tort by accepting the dividend. And the court also held that the granting of the discharge was not res judicata of the claim for the balance of the debt.

In the instant case the defendants who have brought the South Carolina action deny that they knew of the existence of their claims until long after the bankruptcy proceedings. Their allegation is that they did not know that they had been defrauded by S. H. P. Pell & Company until some time after July 1, 1916. The order of

confirmation of the composition agreement was entered on January 25, 1915. The allegations of fraud contained in the complaint in the South Carolina action may be found in the margin.[1]

The South Carolina action is based on fraud and deceit and is of such a nature that the tort claim it asserts was not provable in bankruptcy even if the plaintiffs in that action had known of the facts of the claim in time to have asserted them in the bankruptcy proceedings. Whether the tort might have been waived and a provable claim in bankruptcy made based on an implied contract if the
142 facts had been known we need not consider as the allegation is that the facts were not known and if not known no such course could have been adopted. And sec. 17 of the Bankruptcy Act declares that "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (4) were created by his fraud * * * while acting * * * in any fiduciary capacity." And the fraud complained of was committed, it is alleged, while the defendants in the South Carolina action were employed by the plaintiffs in that action as cotton brokers to buy and sell cotton for the account and risk of the plaintiffs, and such fraud was in connection therewith.

The bill of complaint in the present suit is exceedingly complicated, and raises a number of questions which the court below did not find it necessary to determine, and which we do not find it necessary to determine. The court below found in the bill no ground for equitable intervention even if all the allegations the bill contains be assumed as true. We are in full agreement with that court in believing that the bill is without equity. It was properly dismissed, and being dismissed for want of jurisdiction the decree is to be modified to provide that the dismissal is without prejudice.

Decree as modified is affirmed.

Judge Ward was present at the argument and participated in the subsequent discussion of the case and concurred in the result. He has not read this opinion being temporarily absent from the country at the time it was prepared and filed.

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[1] "That in the course of the employment of defendants by plaintiffs aforesaid, plaintiffs sent to defendants certain orders for the purchase and sale of cotton as aforesaid, which defendants agreed and promised to execute upon the said New York Cotton Exchange. That defendants not only neglected, failed and omitted so to execute the said orders, but falsely and fraudulently stated, reported and represented to plaintiffs that the said orders had been duly executed upon the said Exchange, and in accordance with the by-laws, rules and regulations thereof, and falsely and fraudulently charged plaintiffs' account with such sums as would have been advanced by defendants and with such sums as would have been earned by defendants if said orders of plaintiffs had in fact been so executed by defendants as by them falsely, and fraudulently stated, reported and represented to plaintiffs.

"That from time to time during said period said defendants rendered to plaintiffs various statements wherein defendants falsely and

143 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court-rooms in the Post-office Building in the City of New York, on the 9th day of February, one thousand nine hundred and nineteen.

Present:

Hon. Henry G. Ward, Hon. Henry Wade Rogers, Circuit Judges; Hon. John C. Knox, District Judge.

STEPHEN H. P. PELL et al., Plaintiffs-Appellants,

v.

W. GORDON MCCABE, JR., and Another, Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is modified in accordance with the opinion of this court and as so modified is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R.
J. C. K.

144 Endorsed: United States Circuit Court of Appeals, Second Circuit. S. H. P. Pell et al., v. W. G. McCabe. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 10, 1919. William Parkin, Clerk.

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fraudulently charged plaintiffs with the purchase price of about one hundred and fifty-seven thousand (157,000) bales of cotton in the amount of approximately Ten Million, One hundred and Ninety-three Thousand, Nine Hundred and Ninety Dollars ($10,193,-990.00), and by said statements falsely and fraudulently represented to plaintiffs such cotton to have been purchased by defendants for plaintiffs' account in accordance with plaintiffs' instructions and with the by-laws, rules and regulations of the said New York Cotton Exchange, and thereby falsely and fraudulently represented to plaintiffs that the amount of the purchase price thereof had been duly paid, laid out, and expended by defendants for and on account of plaintiffs, and that the amount of defendants' commissions charged to plaintiffs in said statements had been duly earned by defendants in and about the purchase and sale of the cotton so falsely represented to plaintiffs to have been purchased for their account and to be due and owing to defendants."

145 In the United States Circuit Court of Appeals for the Second Circuit, October Term.

In Equity. No. 136.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and ROBERT M. THOMPSON, Appellants,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Appellees.

To the Honorable Henry Galbraith Ward, Senior Circuit Judge, and the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Come now Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson, plaintiffs in the above entitled action in the United States District Court for the Southern District of New York, and appellants in the said Circuit Court of Appeals of the United States for the Second Circuit, by their solicitors, Messrs. Emanuel J. Myers, Samuel J. Goldsmith and Gordon S. P. Kleeberg, and complain that in the record and proceedings and also in
146 the rendition of the decree or judgment of the United States Circuit Court of Appeals for the Second Circuit, sitting at the City of New York, in the State of New York, within the Southern District of New York, in the above entitled and numbered cause, on the 10th day of February A. D. 1919, modifying the judgment and decree of the United States District Court for the Southern District of New York and dismissing the suit solely for want of jurisdiction in said cause, manifest error has intervened to the great injury and damage of these petitioners; that the jurisdiction of the District Court of the United States for the Southern District of New York, in said cause, depended upon the following matters and things alleged in the Bill of Complaint in this suit, to wit:

The appellants as plaintiffs contend that by reason of certain proceedings had in and orders and decrees of the United States District Court for the Southern District of New York, in the bankruptcy proceedings of S. H. P. Pell & Co. therein maintained, these defendants and appellees cannot maintain an action as plaintiffs in South Carolina or anywhere against these plaintiffs as defendants therein, and that they (defendants and appellees) should be enjoined from so doing.

147 S. H. P. Pell & Co., a firm, were New York Cotton Exchange brokers against whom on August 3, 1914, an involuntary petition in bankruptcy was duly filed in the District Court of the United States for the Southern District of New York on the bankruptcy side of that Court, to have that firm and Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, as individually alleged to compose that firm, adjudicated involuntary bankrupts.

Subsequently on November 23rd and 28th, 1914, petitions were duly filed in the said bankruptcy proceedings in said District Court which prayed that Robert M. Thompson be made a party to those

proceedings and be adjudicated a general partner and an involuntary bankrupt.

On November 25, 1915, the firm of S. H. P. Pell & Co. and Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell were adjudicated involuntary bankrupts.

Negotiations were had in said bankruptcy proceedings between the bankruptcy receivers (appointed by said District Court), the bankrupts, certain New York Cotton Exchange creditors and Robert M. Thompson subsequent to November 25, 1915, for the adjustment and settlement of the claims of the New York Cotton Exchange
148 creditors whose scheduled claims aggregated over $2,000,000; the withdrawal by Robert M. Thompson of the scheduled claim in his behalf against the bankrupt estate for $3,373,082.30, the release of the bankrupt estate therefrom, and divers other matters, and the settlement of all questions and disputes with and the release and discharge of Robert M. Thompson and the withdrawal of the said petitions against the said Robert M. Thompson.

A decree was duly entered in said bankruptcy proceedings on January 25, 1915, in which it was inter alia adjudged that it was for the best interests of the bankrupt estate that the matters in controversy with Robert M. Thompson be settled, and that Robert M. Thompson shall be relieved from any liability to the said receivers or to the bankrupt estate, and that the petitions and proceedings against said Robert M. Thompson be dismissed.

On September 13, 1918, in the District Court of the United States for the Southern District of New York, the appellants as plaintiffs, filed their bill of complaint invoking the exercise of ancillary jurisdiction against the defendants, wherein they allege in sub-
149 stance that the defendants in disregard of a compromise and settlement of a controversy between Robert M. Thompson and the Receivers in Bankruptcy of the firm of S. H. P. Pell & Co., approved by the United States District Court for the Southern District of New York in said Bankruptcy proceedings, and in disregard and violation of the said orders and decrees settling said controversy, and of a compromise agreement confirming the same, had instituted and were carrying on a suit against the plaintiffs in a Court of the State of South Carolina, wherein and whereby the defendants as plaintiffs in said suit, sought to relitigate a matter already determined in the Bankruptcy Court, and to assert a liability against the plaintiffs, which had been duly determined, compromised and released in the said bankruptcy proceedings.

The bill showed by its exhibits, referred to therein and made a part thereof, that in the said bankruptcy proceedings a dispute arose as to the rights and obligations of Robert M. Thompson, who claimed therein to be a special and not a general partner of the bankrupt firm of S. H. P. Pell & Co., and that the dispute was compromised and settled by an agreement between said Robert M. Thompson and the Receivers, which was ratified by the Bankruptcy Court by its orders and decrees entered on January 6, 1915, and January 25, 1915.

150 By their said bill, the appellants as plaintiffs sought perpetually to enjoin and restrain the appellees as defendants,

from taking any further steps or proceedings in their South Carolina action, which shall proceed on the ground that Robert M. Thompson is liable as a general partner of the firm of S. H. P. Pell & Co. composed of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, as general partners, and Robert M. Thompson, as special partner, in respect to any claim which was provable in the bankruptcy proceedings or otherwise, and perpetually to enjoin the defendants from maintaining and continuing the said action in the said Court of South Carolina, and from instituting any other action founded upon the transactions set forth in the bill of complaint therein; and to perpetually enjoin the defendants from attacking the power and jurisdiction of the District Court of the United States for the Southern District of New York in bankruptcy to make and enter the orders and decree under which, by said bill, the appellants contended that certain rights and protection had been secured to them, and especially to Robert M. Thompson;

And for an interlocutory injunction and other proper relief.

151 The jurisdiction of the said District Court in and for the Southern District of New York was not invoked on the ground of diversity of citizenship, but upon the ground that by reason of the said orders and decrees and other proceedings in the said bankruptcy court, the said District Court had jurisdiction to protect the appellants, and especially the said Robert M. Thompson, in all of the rights which he and they had secured in virtue of the said proceedings in and orders and decrees of said Bankruptcy Court.

Thereafter in said suit the defendants, appellees, claiming to reserve their objections to the jurisdiction of the District Court, answered the bill of complaint herein, and among other things, in lieu of demurrer, denied that the bill of complaint made a case entitling the plaintiffs to relief in a court of equity, and for special ground of demurrer alleged:

"That it appears from the plaintiffs' complaint that this court has no jurisdiction of the parties or of the subject matter of this suit, either as an original action or as an ancillary suit, and that it appears on the face of the complaint that no cause of action exists in favor of these plaintiffs for the relief prayed for or for any relief from this court."

After argument upon the issue of law thus presented the

152 learned District Court dismissed the bill of complaint and passing over the questions of jurisdiction, determined that the bill was without equity.

Thereupon the plaintiffs-appellants appealed to the United States Circuit Court of Appeals for the Second Circuit, and after argument in the Circuit Court of Appeals the judgment or decree of dismissal of the District Court was modified by this Honorable Court so as to provide that the bill of complaint was dismissed for want of jurisdiction, and that the dismissal was without prejudice, and as so modified was the judgment or decree affirmed by the Circuit Court of Appeals for the Second Circuit.

That the amount involved in said suit and the matter in controversy exceeds the sum of $3,000 besides costs and interest, and is not

a case in which the jurisdiction of the Circuit Court of Appeals for the Second Circuit is made final.

An assignment of errors is filed herewith.

Wherefore your petitioners pray for the allowance of this appeal to the end that the cause may be carried to and heard by the Supreme Court of the United States.

Petitioners pray for such other and further process as is
153 or may be required to perfect the appeal prayed for to the end that the error therein may be corrected.

MYERS & GOLDSMITH,
By EMANUEL J. MYERS,
SAMUEL J. GOLDSMITH,
GORDON S. P. KLEEBERG,
Solicitors for said Petitioners,
100 *Broadway, Borough of Manhattan,*
City of New York.

154 The appeal prayed for in the foregoing petition is hereby allowed, and it is ordered that the petitioners-appellants give a bond in the sum of $1,000.00 conditioned as the law directs, this 10th day of March, A. D. 1919.

MANTON,
Circuit Judge of the United States
in and for the Second Circuit.

155 In the United States Circuit Court of Appeals for the Second Circuit, October Term.

In Equity. No. 136.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and ROBERT M. THOMPSON, Plaintiffs-Appellants,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants-Appellees.

Assignment of Errors.

Come now Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson, appellants and plaintiffs herein, and file the following assignment of errors, and complain and specify that in the following respects, and each and every of them, the decision and judgment of the above named Honorable Circuit Court of Appeals is erroneous and unjust to them:

First. Because the Circuit Court of Appeals held that the District Court of the United States for the Southern District of New York was without jurisdiction to take cognizance of, entertain and proceed with the cause upon the case made and presented by the bill of complaint.

156 Second. Because the Circuit Court of Appeals erred in not holding and determining that the District Court had jurisdiction of the said bill of complaint in the exercise of its general equity powers as ancillary to the jurisdiction which was invoked and had been exercised by the District Court in proceedings in bankruptcy.

Third. Because the Circuit Court of Appeals erred in not holding and determining that the District Court of the United States for the Southern District of New York had jurisdiction to take cognizance of, entertain and proceed with the cause and grant the relief and protection which should have been and was thereby secured by the orders and decrees of the Bankruptcy Court to the plaintiffs-appellants, which the defendants-appellees vexatiously sought to re-litigate, overthrow or disregard.

Fourth. Because the Circuit Court of Appeals erred in erroneously misconstruing and failing to give adequate relief for the scope and effect of the said proceedings in and orders and decrees of the court of bankruptcy and the protection which should have been and was thereby secured to the appellants-plaintiffs, and especially
157 Robert M. Thompson, one of the appellants-plaintiffs.

Fifth. Because the Circuit Court of Appeals erred in not holding that in the exercise of the ancillary jurisdiction in equity of the said District Court the said bill of complaint should have been retained and a trial of the issues of fact raised by the pleadings in the said cause proceeded with upon the merits thereof.

Sixth. In that the Honorable Circuit Court of Appeals should have ordered the reversal of the judgment and decree of the District Court rendered in the said cause, and thereupon remanded the said cause with instructions to proceed with the trial thereof.

Wherefore, these parties pray that the said decree of the Honorable Circuit Court of Appeals be reversed and the judgment of the said Honorable District Court be likewise in all things reversed, and that such other orders and decrees in the premises be made as shall effect a reversal of the said decrees and secure to these parties plaintiffs-appellants their costs and all further relief to which in equity they may be entitled.

EMANUEL J. MYERS,
SAMUEL J. GOLDSMITH,
GORDON S. P. KLEEBERG,
Attorneys and Solicitors for Plaintiffs-Appellants.

158 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson, Appellants, against W. Gordon McCabe, Jr., and William F. Gray, Appellees. Original. Petition for Allowance of Appeal and Assignment of Errors. Myers & Goldsmith, Solicitors for Appellants, No. 100 Broadway, American Surety Co. Building, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 10, 1919. Wm. Parkin, Clerk.

159 Know all men by these presents, That we, Stephen H. P. Pell, Charles A. Kittel, Howland H. Pell and Robert M. Thompson, as Principals, and the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 47 Cedar Street, Borough of Manhattan, City of New York, as Surety are held and firmly bound unto W. Gordon McCabe, Jr. and William S. Gray, in the full and just sum of One Thousand ($1,000.00) Dollars, to be paid to the said W. Gordon McCabe, Jr. and William S. Gray, their certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of March, 1919.

Whereas, at a term of the United States Circuit Court of Appeals for the Second Circuit, in a suit pending in said Court, between the said Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson, Appellants and W. Gordon McCabe, Jr. and William S. Gray, Appellee, an order was made on the 10th day of February, 1919, modifying the judgment and decree of the District Court of the United States, Southern District of New York, dismissing the plaintiffs' bill herein and the said Stephen H. P. Pell, Charles A. Kittel, Howland H. Pell and Robert M. Thompson having obtained an order allowing an appeal to the Supreme Court of the United States and filed a copy thereof in the Clerk's office of the Circuit Court of Appeals, Second Circuit; and having obtained a citation directed to the said defendants citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington on the 9th day of April, 1919.

Now, the condition of the above obligation is such that if the said Stephen H. P. Pell, Charles A. Kittel, Howland H. Pell and
160 Robert M. Thompson shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

STEPHEN H. P. PELL. [L. S.]
CHARLES A. KITTLE. [L. S.]
HOWLAND H. PELL. [L. S.]
ROBERT M. THOMPSON. [L. S.]

By *G. J. GOLDSMITH, Att'y.*

UNITED STATES FIDELITY AND GUARANTY CO.,

By S. FRANK HEDGES,
Attorney-in-Fact.

Sealed and delivered in the presence of

——— ———.

Attest:

WILLIAM H. ESTWICK,
[SEAL.] *Attorney-in-Fact.*

Affidavit, Acknowledgment and Justification by the United States Fidelity and Guaranty Company.

STATE OF NEW YORK,
County of New York, ss:

Before me personally came S. Frank Hedges, known to me to be attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Stephen H. P. Pell, Charles A. Kittel, Howland H. Pell and Robert M. Thompson as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the attorney-in-fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Stephen H. P. Pell, Charles A. Kittel, Howland H. Pell and Robert M. Thompson is the corporate seal of the said United States Fidelity and
161 Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as such attorney-in-fact of said Company; and that he is acquainted with William H. Estwick and knows him to be attorney-in-fact of said Company; and that the signature of said William H. Estwick subscribed to said bond is the genuine handwriting of said William H. Estwick and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company unencumbered and liable to execution, exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

[SEAL.] S. FRANK HEDGES.

Sworn to and acknowledged before me, and subscribed in my presence this 10th day of March, 1919.

AUGUSTUS WALLAUER,
Notary Public, Queens County No. 1983.

Certificate filed in New York County No. 809, Register's No. 9288; Kings County No. 97, Register's No. 9101; Bronx County No. 18, Register's No. 948; Richmond, Westchester, Nassau, Putnam, Orange and Suffolk Counties. Term expires March 30, 1919.

Endorsed: Stephen H. P. Pell, Charles A. Kittel, Howland H. Pell and Robert M. Thompson, Principals, United States Fidelity and Guaranty Company, Surety, to W. Gordon McCabe, Jr., and William S. Gray. Bond for costs on appeal. The within undertaking is ap-

proved as to form and as to the sufficiency of the surety. N. Y. March 10, 1919. Martin T. Manton, United States Fidelity and Guaranty Co., 48 Cedar Street, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 10, 1919. William Parkin, Clerk.

162 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 161 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Stephen H. P. Pell et al. against W. Gordon McCabe, Jr., and William F. Gray, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3d day of April in the year of our Lord One Thousand Nine Hundred and nineteen and of the Independence of the said United States the One Hundred and forty-third.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

163 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Stephen H. P. Pell et al. are appellants, and W. Gordon McCabe, Jr., et al. are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

164 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-second day of March, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

165 [Endorsed:] File No. 26,975. Supreme Court of the United States, No. 889, October Term, 1918. Stephen H. P. Pell et al. vs. W. Gordon McCabe, Jr., et al. Writ of Certiorari. Myers and Goldsmith, Solicitors for Petitioners, 100 Broadway, New York City.

166 [Endorsed:] File No. 26,975. Supreme Court U. S. October Term, 1918. Term No. 889. Stephen H. P. Pell et al. Petitioners, vs. W. Gordon McCabe, Jr., et al. Writ of certiorari and return. Filed April 9, 1919.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON,
Plaintiffs-Petitioners,

versus

W. GORDON MCCABE, JR., and WILLIAM F. GRAY,
Defendants-Respondents.

Sir:

PLEASE TAKE NOTICE that the petition of Stephen H. P. Pell and others for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, a copy whereof is herewith served upon you, together with the transcript of record in the cause, will be presented to the Supreme Court of the United States at a session of the Court thereof, to be held in the City of Washington, District

of Columbia, on the 10th day of March, 1919, at the opening of the Court.

Dated, New York, February 21st, 1919.

Yours, etc.,

EMANUEL J. MYERS,
GORDON S. P. KLEEBERG,
Attorneys for Petitioners,
100 Broadway,
Manhattan,
City of New York.

To:

W. ST. JOHN TOZER, Esq.,
Attorney for Respondents,
42 Broadway,
Manhattan,
City of New York.

IN THE

SUPREME COURT OF THE UNITED STATES

October TERM, 1918.

No.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON,
Plaintiffs-Petitioners,

versus

W. GORDON MCCABE, JR., and WILLIAM F. GRAY,
Defendants-Respondents.

PETITION.

ON APPLICATION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioners, Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson, respectfully present this their petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit and represent and allege the following as a summary and short statement of the matter involved and the general reasons relied on for the allowance of the writ:

Your petitioners seek to review a decision of the Circuit Court of Appeals for the Second Circuit

which modified a decree of the United States District Court for the Southern District of New York by dismissing without prejudice and for want of jurisdiction the appeal of your petitioners as plaintiffs against the above mentioned respondents as defendants, and as so modified affirmed the decree of the said District Court for the Southern District of New York, which dismissed the bill of complaint of the said plaintiffs pursuant to a motion made by the defendants for judgment on the pleadings, upon the grounds of demurrer set up in the answer of the said defendants to the said bill (in the previous proceedings in this cause designated as the complaint).

A certified copy of the entire transcript of record in the said suit, including the proceedings in the Circuit Court of Appeals, to which the writ of certiorari is asked to be directed, is herewith furnished, together with the opinions of the Circuit Court of Appeals and two opinions in the District Court, to be attached and made part of this application, marked Exhibit A, in compliance with Rule 37 of this Court.

I.

On September 13, 1918, in the District Court of the United States for the Southern District of New York, your petitioners, as plaintiffs, filed their said bill of complaint invoking the exercise of ancillary jurisdiction against the defendants (Transcript of Record, p. 4), wherein they allege in substance that the defendants in disregard of a settlement of a controversy between Robert M. Thompson and the Receivers in bankruptcy of the firm of S. H. P. Pell and Company, approved by the United States District Court for the Southern District of New

York, in bankruptcy proceedings theretofore pending before it, and in disregard of the order settling said controversy, and of a compromise agreement and decree confirming the same, had instituted and were carrying on a suit against the plaintiffs in a Court of South Carolina, whereby the defendants sought to relitigate a matter already determined in the Bankruptcy Court, and to assert a liability against the plaintiffs, which had been fully determined, compromised and released in the bankruptcy proceedings.

The bill showed by its exhibits referred to therein and made a part thereof that in the said bankruptcy proceedings a dispute arose as to the rights and obligations of Robert M. Thompson, who claimed therein to be a special and not a general partner of the bankrupt firm, and that the dispute was compromised by an agreement between Thompson and the Receivers, ratified by the Court by order entered January 6, 1915 (Exhibit 7, pp. 74-88); and that thereafter a compromise offer was made and a decree of confirmation was entered (Exhibit 9, pp. 92-98), and that the decree confirming the compromise contained the following:

> "Ordered, Adjudged and Decreed that it is for the best interests of the estate and of the creditors thereof that the settlement with Robert M. Thompson set forth in said offer of composition and the transfer of the property to him referred to in said offer, shall be made, * * * and thereupon the said Robert M. Thompson shall be relieved of any further liability to the said receivers or to the estate by reason of the order heretofore entered by this Court dated January 6, 1915, or otherwise * * *" (Bill, p. 95).

By their said bill the plaintiffs sought (p. 23) perpetually to enjoin and restrain the defendants from taking any further steps or proceedings in their South Carolina action, which shall proceed on the ground that your petitioner, Robert M. Thompson, is liable as a general partner of the firm of S. H. P. Pell & Co., composed of the above-named petitioners, Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, as general partners, and your petitioner, Robert M. Thompson, as special partner (Bill, p. 5), in respect to any claim which was provable in the bankruptcy proceedings, and perpetually to enjoin the defendants from maintaining and continuing the said action in the said Court of Common Pleas for the State of South Carolina, and from instituting any other action founded upon the transactions set forth in the complaint therein; and to perpetually enjoin the defendants from attacking the power and jurisdiction of the District Court of the United States for the Southern District of New York in bankruptcy to make and enter the orders and decree under which, by said bill, the plaintiffs, your petitioners, contended that certain rights had been secured to them, and especially to your petitioner Robert M. Thompson; and for an interlocutory injunction and other proper relief.

The jurisdiction of the said court in New York was not invoked on the ground of diversity of citizenship (the citizenship of the parties not being disclosed in the bill), but upon the ground that by reason of the said composition and the decree or order confirming the same, and the other proceedings in the said bankruptcy court, the said court had jurisdiction to protect the petitioners, and especially the said Robert M. Thompson, in all of

the rights which he and they had secured in virtue of the said proceedings in said Bankruptcy Court.

The said bill set forth at length and by exhibits referred to therein the said proceedings in bankruptcy, including the following proceedings in said court in the Southern District of New York:

An adjudication in bankruptcy dated November 25, 1914, whereby "Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, as individuals, and the firm of S. H. P. Pell & Co." were declared and adjudged bankrupts (Exhibit 4, pp. 48-49);

An extract from their schedules from which it appeared that your petitioner, Robert M. Thompson, was a creditor in the sum of $3,373,082.30 (Exhibit 5, p. 50);

Two petitions in said proceedings praying that Robert M. Thompson be made a party defendant therein and be adjudicated a bankrupt (Exhibits 1 and 2, pp. 28 to 45);

Subpoena returned duly served upon Robert M. Thompson (Exhibit 3, pp. 46-47);

Offer of composition (Exhibit 6, pp. 51 to 73);

Petition of the receivers in bankruptcy concerning the same (Exhibit 7, pp. 74-87), together with the acceptance of the offer of composition and agreement to conform therewith by your petitioner Robert M. Thompson (Exhibit 7, p. 87);

Order upon the petition of the receivers in bankruptcy ratifying and approving a contract between the said receivers and the said Robert M. Thompson, whereby in settlement of a controversy with the receivers in bankruptcy, the dispute with Thompson was compromised and disposed of (Exhibit 8, pp. 89-91);

Order confirming the agreement of settlement and composition (Exhibit 9, pp. 92 to 98).

The bill of complaint further alleged among other things the history of the said proceedings in bankruptcy, including the receivership, and the fact that the receivers gave notice to the defendants that the firm was in bankruptcy and of their appointment as receivers, and that the receivers demanded the payment of a claim due from the defendants to the bankrupt estate amounting to $261.52, and another claim of $91,467.57, and that defendants paid the said sum of $261.52 to the receivers and disputed their liability for the said amount of $91,467.57, and litigated the same thereafter in a suit instituted by the trustee of the said firm assets, who was appointed pursuant to the said composition, but interposed as a defense as upon contract and in such manner as to constitute it a provable claim in bankruptcy against said firm, the claim which they were now attempting to set up as a claim founded upon tort in the said South Carolina action (Exhibits 10 and 11, pp. 99-106).

The bill further alleged that the terms of the said composition and order of confirmation were fully carried out by the plaintiffs and each of them (p. 13), and alleged that by virtue of said proceedings

> "the said bankrupts and Robert M. Thompson were released and discharged from all liability for the debts of and all provable claims against the firm of S. H. P. Pell & Co., and the creditors of said S. H. P. Pell & Co. were forever barred, and that the general partners and Robert M. Thompson as special partner, or otherwise were as partners and individuals released and discharged from any further liability to the creditors of the said firm including the defendants" (p. 13).

The bill specifically alleged (p. 5) that the firm of S. H. P. Pell & Co. was a limited partnership formed and organized under the laws of the State of New York, and that your petitioners Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell were general partners, and Robert M. Thompson was the special or limited partner.

The bill further alleged (p. 19) that the suit in South Carolina was brought with the intention of attacking the power and jurisdiction of the United States District Court for the Southern District of New York to entertain the offer of composition, to make and enter the order of confirmation and the order affirming the contract between the receivers and your petitioner Thompson, and with the malicious intention and design of vexing and harassing the plaintiffs, and that its purpose was to needlessly and uselessly vex, annoy and harass them and subject them to great and unnecessary expense in attending and defending the action in South Carolina, remote and distant from their several places of occupation and residence and the place of residence and occupation of the necessary witnesses; and that it depended upon the same state of facts which were either brought out or could have been proven in the bankruptcy proceedings, and that any and all questions of fact and law which could have been raised and urged in said South Carolina action could have been raised, urged and maintained in the bankruptcy proceeding (p. 20); and that the real and actual purpose and design of the action in South Carolina was to assail and attack the validity and sufficiency of the proceedings, orders and decrees in bankruptcy, and the power and jurisdiction of the court in those proceedings.

The bill showed that Robert M. Thompson had entered a special appearance in the South Carolina cause and objected to the jurisdiction, and had the cause removed into the United States District Court for the Eastern District of South Carolina (p. 21), and that the action pending in South Carolina exposed the defendants to judgment of a court other than the court which rendered the orders, judgment and decree upon which the plaintiffs rely, and would expose and subject them to a liability from which they had already been released and discharged by the said court in bankruptcy (pp. 21-22).

The bill also alleged (p. 22) that there were other persons who had threatened and intended to bring similar vexatious and harassing suits upon similar grounds in the courts of distant states, and that though it was impossible and impracticable to make all of the creditors of the firm parties, plaintiffs offered to make and admit as additional parties all persons claiming to be creditors of the said firm who might desire to come into the suit and be heard.

The bill alleged that the plaintiffs had no adequate remedy at law, and could have no adequate relief except in the District Court for the Southern District of New York.

To this bill the defendants appeared specially by attorney (p. 107) for the sole purpose of objecting to the jurisdiction of the court. Subsequently Hon. Charles M. Hough, Circuit Judge (Opinion, p. 128), pointed out that in an endeavor to restrain a defendant, who was party or privy to a decree in bankruptcy, there was jurisdiction to entertain the suit, and expressed it as his view that the question of the power of the court to make the decree in

bankruptcy, upon which the plaintiffs rely, and its proper construction was a question which could not be raised under a special appearance, but which entitled the plaintiffs at all events to a full trial (p. 128). He continued an injunction and set the cause down for trial (p. 129).

Thereafter the defendants, claiming to reserve their objections to the jurisdiction (p. 108), answered the complaint, and among other things, in lieu of demurrer, denied that the complaint made a case entitling the plaintiffs to relief in a court of equity, and for special ground of demurrer alleged (p. 115):

> "That it appears from the plaintiffs' complaint that this court has no jurisdiction of the parties or of the subject matter of this suit, either as an original action or as an ancillary suit, and that it appears on the face of the complaint that no cause of action exists in favor of these plaintiffs for the relief prayed for or for any relief from this court."

Thereupon the solicitor for the defendants, appearing specially, moved for an order calling up and disposing of the issues of law and for judgment on the pleadings dismissing the complaint for the grounds so specified, and for other relief (p. 118). After argument the District Court dismissed the complaint (p. 119).

In the opinion upon the said dismissal, Learned Hand, District Judge (p. 124), passing over the questions of jurisdiction, determined that the bill was without equity (p. 127).

Thereupon the plaintiffs appealed to the Circuit Court of Appeals for the Second Circuit (pp. 2, 122), and after argument in the Circuit Court of

Appeals the order or decree of dismissal was modified so as to provide that the bill was dismissed for want of jurisdiction, and that the dismissal was without prejudice. and as so modified was affirmed (Opinion of Circuit Court of Appeals and Order for Mandate, pp. 146, 147).

II.

Your petitioners, feeling aggrieved by the foregoing disposition of their appeal, now apply to this Court for a review by writ of certiorari, and represent that the Circuit Court of Appeals erred in the following particulars, to wit:

In that it held that the court was without jurisdiction, whereas the court had jurisdiction of the said bill in the exercise of its general equity powers as ancillary to the jurisdiction which was invoked and had been exercised by it in the proceedings in bankruptcy, and for the protection of the rights secured thereby to your petitioners, which the defendants vexatiously sought to overthrow or disregard; and

Further, that in reaching such conclusion of the lack of jurisdiction, the Circuit Court of Appeals erroneously misconstrued the effect of the proceedings in the court of bankruptcy, and the protection which should have been and was thereby secured to your petitioners, and especially your petitioner Robert M. Thompson; and

Further, that in the exercise of the ancillary jurisdiction in equity of the said court the bill should have been retained and a trial of the issues of fact raised by the pleadings proceeded with.

III.

The reasons of gravity which your petitioners present for the review which they pray are as follows:

That it has now been determined in this cause by the Circuit Court of Appeals for the Second Circuit that the District Courts of the United States are without ancillary jurisdiction to protect the persons with whom in the course of proceedings in bankruptcy contracts are made under the direction of the court by receivers in bankruptcy in behalf of the estates represented by them in adjustment and final settlement of disputes between the receivers and creditors of the bankrupt estate on the one hand and, on the other hand, persons claiming to be creditors of the bankrupts and to be entitled to a share in the distribution of their assets; and

That such courts are without power to entertain a bill to protect parties to such settlements against the vexatious reopening of such controversy so settled, or to consider the merits of such bill.

IV.

Your petitioner, Robert M. Thompson, claiming to be a special partner and relying upon his contract in settlement of a dispute with the receivers of S. H. P. Pell & Co., approved by the court in bankruptcy, withdrew his scheduled claim of $3,373,082.30 (Bill, p. 10), and assumed the obligation to pay loans upon property belonging to him, the original amount of which was $2,150,000 (Bill, pp. 64, 70), and secured a decree or order from the Bankruptcy Court, in terms discharging him from all further liability (Bill, Exhibit 9, p. 96); and

yet the defendants vexatiously (Bill, p. 20) and without any offer to restore, attempt, in another jurisdiction, to hold him to further liability for the debts of the firm. He represents that the situation is one which ought to appeal forcibly to a court of equity for relief.

Your petitioners represent that such determination creates an unjustified exception from the general rule respecting ancillary jurisdiction of the courts of the United States to protect persons deriving rights or claiming to derive rights under their decrees, and especially decrees in bankruptcy, and especially persons who, disputing their liability as debtors and claiming to be creditors of the bankrupt estate, undertake by contract made with the receivers of the bankrupt estate with the approval of the court in bankruptcy to settle the entire controversy and dispute as to the relations of such persons with the bankrupt and his estate; and especially where by such settlement such persons are induced, in reliance upon such settlement, to forego larger advantages, as in the present instance, represented by a claim set forth in the schedules to amount to $3,373,082.30 (Exhibit 5, p. 50); and especially where the person so disregarding the effect of the settlement of the controversy has induced the same by acknowledging himself to be a debtor of the bankrupt estate, and paying a claim alleged against him by the receivers in bankruptcy as a debtor.

V.

Your petitioners respectfully submit that questions concerning the scope of the jurisdiction, both original and ancillary, of the courts of the United

States are peculiarly within the power of this Court for determination, and that the question presented by the appeal to the Circuit Court of Appeals in the present case has novelty justifying its review by this Court, especially in view of the uncertain limits of the ancillary jurisdiction of the courts of the United States in the protection of persons acquiring rights under their decrees, and especially in view of the divergent opinions of the respective judges in this cause, the first of whom in the District Court (Circuit Judge Hough) was of the opinion that there was jurisdiction in the court to entertain the suit, and at all events that there was enough in the suit to entitle the plaintiffs to a full trial (p. 128), whereas the District Judge (Hand) who heard the argument upon the demurrer passed over the questions of jurisdiction (pp. 124, 125) and reached the conclusion (p. 127), for the purposes of demurrer, that there was no ground for equitable intervention, and that consequently the bill was without equity, and whereas the Circuit Court of Appeals modified the decree and dismissed without prejudice, and solely for want of jurisdiction (Opinion and Order for Mandate, pp. 146, 147).

Your petitioners further represent that this is not a cause where this Court is without jurisdiction by reason of any right of review directly from the District Court, nor by reason of any failure of the Circuit Court of Appeals to certify questions to this Court.

VI.

Wherefore, because of the gravity and importance of the questions involved, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court directed to the Judges of the Circuit Court of Appeals for the Second Circuit, commanding them and each of them to certify and send to this Court on a day certain, to be therein designated, the full and complete transcript of the record of the proceedings of that court in this cause, and which was entitled in that court: Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson, plaintiffs-appellants, against W. Gordon McCabe, Jr., and William F. Gray, defendants, ... October Term, No. /36 , to the end that the judgment or decree of said Circuit Court of Appeals in the said case may be reviewed as provided in Section 240 of the Judicial Code and its amendments, and that your petitioners and each of them may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with the said provisions of the Judicial Code; and that the decree in the said Circuit Court of Appeals and every part thereof may be reversed by this Honorable Court.

STEPHEN H. P. PELL,
CHARLES A. KITTLE,
HOWLAND H. PELL,
ROBERT M. THOMPSON,
Petitioners,

By EMANUEL J. MYERS,
GORDON S. P. KLEESBERG,
Attorneys for Petitioners.

LINDLEY M. GARRISON,
Counsel for Petitioners.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

EMANUEL J. MYERS, being duly sworn, says that he is one of the attorneys for the petitioners above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

EMANUEL J. MYERS.

Sworn to and subscribed before me
this 25th day of February, 1919.

CECILIE ULLMAN,
Notary Public,
Residing in New York County.
N. Y. Co. Clerk's Office Reg. No. 9003.

Mary Seal

CERTIFICATE OF COUNSEL.

I hereby certify that I have examined the foregoing petition and in my opinion the said petition is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

LINDLEY M. GARRISON,
of Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Introductory.

The Court had the ancillary jurisdiction invoked over the subject-matter; and on the merits a case was made out for the relief sought and for the exercise of the jurisdiction; and confusion has arisen between the existence of jurisdiction and the existence of facts to justify its exercise.

Thompson's situation should appeal strongly to the conscience of a Chancellor, he, claiming to be a special partner of the bankrupt firm, and relying upon his contract of compromise and settlement of a dispute with the receivers in bankruptcy of the firm, which was formally ratified and approved by the Court in bankruptcy, withdrew his scheduled claim as a creditor for $3,373,082.30 (Bill, p. 10) and assumed the obligation to pay loans upon property belonging to him, but pledged for the firm obligations, the original amount of which was $2,150,000 (Bill, pp. 84, 70), and secured a decree from the Bankruptcy Court in terms discharging him in consideration of this conduct from all further liability (Bill, Exhibit 9, p. 96); and yet, without any offer or attempt to restore him to his former position, the defendants now assail him in a foreign jurisdiction to answer to them for an alleged debt of the firm; and by the action of the Courts below he is remitted to the mercies of the foreign court for his defense.

The decision and mandate of the Circuit Court of Appeals, which modified the decree of dismissal so as to dismiss the bill without prejudice for want

of jurisdiction, recognized the general principles of ancillary jurisdiction for which we contend (Opinion, pp. 139-142), but unduly limited them in application by misinterpreting the effect of the proceedings in bankruptcy as an insufficient basis for the recognition of the ancillary jurisdiction as applicable to the cause before the Court.

It is not contended that the Court had original jurisdiction because of diversity of citizenship of the parties, for their citizenship was not made apparent by the bill—only their residence was stated (Bill, Record, pp. 4-5).

The sole ground upon which jurisdiction was invoked was that the plaintiffs, regardless of the residence or citizenship of the parties, were entitled to appeal by bill in equity to the Court which rendered the decree and authorized the proceedings upon which they relied to protect them against the inequitable and harassing disregard thereof to the detriment and annoyance of the plaintiffs.

The Basis of Ancillary Jurisdiction to Protect Rights Obtained Under Previous Decrees.

The opinion of the Circuit Court of Appeals very properly announces the general principle upon which such jurisdiction is assumed.

It says (Record, pp. 139-142):

> "In *Street's Federal Equity Practice* vol. 2, sec. 1229 that writer says: 'It is a rule, subject to but one exception, that jurisdiction in an ancillary proceeding is supported by the jurisdiction of the court in the main, or principal cause. Hence the ordinary jurisdictional averments may be dispensed with in such a proceeding. If a court has jurisdiction of the principal suit, it also has jurisdiction of any ancillary proceeding in that

suit. Neither the citizenship of the parties, nor the amount in controversy, nor any other factor that would ordinarily determine jurisdiction, has any bearing on the right of the court to entertain that proceeding.'

"The one exception above referred to relates to an ancillary receivership and with that we are not now concerned. The right of a Federal court to sustain jurisdiction of an ancillary suit without reference to the citizenship of the parties was fully considered in *Krippendorf* v. *Hyde* 110 U. S. 276 which reviewed the authorities (citing additional authorities).

"The jurisdiction of a court over a particular subject matter and that court's power to apply a remedy no doubt are coextensive. So that demands which are ancillary to the main action may be taken cognizance of by the court and determined in aid of its authority over the principal matter. And a court may entertain proceedings ancillary to its judgment or decree, for the jurisdiction it originally acquired is not exhausted by the entry of the judgment and the power is still in the court to issue all proper process and take all proper proceedings for the enforcement of its judgment. All this is familiar doctrine and well established law.

"An ancillary suit may be maintained:

1. To aid, enjoin or regulate the original suit.

2. To restrain, avoid, explain or enforce the judgment or decree entered in the original suit.

3. To enforce or adjudicate liens or claims to property in the custody of the court in the original suit.

4. To prevent the relitigation in other courts of the issues heard and adjudged in

the original suit, and to protect the titles and rights acquired under its judgment or decree from attack based on the theory that the adjudication in the original suit was illegal or ineffective (citing authorities).

"In *Bates on Federal Equity Procedure*, Vol. 1, Sec. 97, the doctrine is summarized as follows:

"A bill filed to continue a former litigation in the same court, or which relates to some matter already partly litigated in the same court, or which is an addition to a former litigation in the same court, by the same parties or their representatives standing in the same interest, or to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties, standing in the same interest, or to prevent a party from using the proceedings and judgment of the same court for fraudulent purposes, or to restrain a party from using a judgment to perpetrate an injustice, or obtain an inequitable advantage over other parties to the former judgment or proceeding, or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court, or to assert any claim, right or title to property in the custody of the court, or for the defense of any property rights, or the collection of assets of any estate being administered by the court, is an ancillary suit" (see Point III, *infra*, p. 50).

The Error of the Circuit Court of Appeals.

The error of the Circuit Court of Appeals consisted in misapplying the principle to the facts of this case by overlooking its very essential aspects.

Thompson a Special Partner.

The primary aspect overlooked is that Thompson was a special partner (Bill, p. 5), which fact is admitted by the demurrer and basic in this suit; he was shown by the bankrupts' schedules to be a creditor in the sum of $3,373,082.30 (Bill, p. 10; Exhibit 5, p. 50); for a valuable consideration he bargained with the receivers (Exhibit 7, p. 87) with the Court's approval (Exhibit 8, pp. 89-91) for the advantages secured to him by the settlement. He was not adjudicated a bankrupt, but as part of the settlement the petitions to have him so adjudicated were dismissed (pp. 57, 94). The general partners only are spoken of herein as "the bankrupts."

Thompson's liability as special partner was fixed by the limited partnership law of New York:

(*McKinney's Consolidated Laws of New York Annotated*, Book 38, p. 55.)

> "Sec. 36. Liability of partners. The general partners in such partnership shall be jointly and severally liable as general partners are by law. The special partners shall not be liable for the debts of the partnership beyond the fund contributed by them respectively to the capital of the partnership."

The offer of composition which was made by the bankrupts, the two Pells and Kittle was upon certain recited considerations (pp. 51, 52), among which was one very important consideration to which the Court of Appeals did not give proper effect, namely, that Thompson should be released from any and all liability to the firm.

Thompson, being admitted by the demurrer to have been a special partner (Bill, p. 5), was not

liable by reason of his connection with the firm, except to the firm upon his dealings therewith, and the result of these dealings was a matter of dispute with the receivers, and in the bankruptcy proceedings. Two creditors sought by petitions therein to have him adjudicated a bankrupt in the proceeding (Exhibits 1 and 2, pp. 26-45); a subpoena was duly served upon him (Exhibit 3, pp. 46-47), and he thereby became a party, amenable to the orders of the Court. The order of confirmation of the composition agreement was entered after hearing counsel for the bankrupts and Thompson (Exhibit 2, p. 93); it directed the transfer to a trustee under the composition agreement

> "of all the assets and property of S. H. P. Pell & Company,"

as well as of the bankrupts individually and as copartners, and

> "of all the right, title and interest of S. H. P. Pell & Company,"

as well as of the bankrupts individually and as copartners in and to the same (p. 94); it directed the receivers to retain certain assets (pp. 94-95).

Thompson Was Expressly Released.

The order of confirmation also contained the following clause:

> "Ordered, Adjudged and Decreed that it is for the best interests of the estate and of the creditors thereof that the settlement with Robert M. Thompson set forth in said offer of composition and the transfer of the property to him referred to in said offer, shall

be made, and the property described and set forth in schedule 'E' is hereby directed to be delivered to said Robert M. Thompson and upon the said Robert M. Thompson executing and delivering to the receivers a release of any and all claims which he may have against the bankrupts, against the receivers thereof, and the estates of S. H. P. Pell & Company and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell and in all respects complying with the terms of the offer of composition on his part to be performed, *and thereupon the said Robert M. Thompson, shall be relieved of any further liability to the said receivers or to the estate by reason of the order heretofore entered by this Court dated January 6, 1915 or otherwise.*" (The italics throughout are our own.)

Thompson's Settlement of a Dispute.

The Circuit Court of Appeals entirely overlooked (so far as disclosed by its opinion) the fact that Thompson in this suit must be treated as a special partner and that in the bankruptcy proceedings he occupied a disputed position; that there he claimed to be a special partner and the largest creditor (his claim scheduled as creditor was $3,373,082.30 [Exhibit 5, p. 50]; no other creditor mentioned in the Schedule C annexed to the offer of compromise had a claim larger than $140,000); that his position was assailed in the proceeding by creditors (Exhibits 1 and 2, pp. 1-45); that he was made a party to the proceeding (Exhibit 3, pp. 46, 47) by subpoena; that he made a bargain with the receivers with the approval of the Court concerning certain of his disputed rights (Exhibit 7, pp. 74-88), and that the Court ratified and ap-

proved his contract (Exhibit 8, pp. 89-91), and that the Court in the order confirming the compromise provided for the transfer of all firm assets (with certain specific reservation) to the selected trustee thereunder, and adjudged that it was for the best interests of the estate and the creditors thereof that the *settlement* with Thompson be made, and that he release to the receivers any and all claims against the bankrupts, the receivers, the estates of S. H. P. Pell & Co., and the bankrupts comply with the terms of the offer on his part to be performed (pp. 95-96), and that thereupon Thompson should be relieved

> "of *any* further liability to the said receivers or *to the estate* by reason of the order heretofore entered in this Court dated January 6, 1915 or *otherwise*."

The Circuit Court of Appeals Overlooked the Effect of Thompson's Settlement.

The Circuit Court of Appeals instead of recognizing in this a *settlement* between the estate of the bankrupts and Thompson, and as securing to Thompson a complete immunity from all claims whatsoever of anybody whomsoever claiming through or under the firm or any of its transactions as a firm, because Thompson had been discharged of all obligation to the firm or its estate, confined its views exclusively to the terms of the offer of compromise as a discharge of the liabilities of the firm and of the bankrupts to their creditors.

Here was the error—the proceedings in the cause discharged Thompson (the special partner), by contract made under the auspices of the Court of all liability to the firm and anyone claiming under it,

whereas the Circuit Court of Appeals considered only the discharge of the bankrupts. It may be, though we dispute it, that the discharge of the *bankrupts* was limited to those who assented thereto, but the discharge of *Thompson* was a discharge of his entire liability of every sort to the firm, its receivers and its estate, and consequently to everyone claiming under the firm or any of the bankrupts.

Instead of giving the full or any effect to this settlement of the dispute between Thompson and the firm, which, so far as Thompson was concerned, was the very essence of this bargain, the Circuit Court of Appeals overlooked this effect entirely and said:

> "But the difficulty with the maintenance of this suit is that it cannot be regarded as in any proper sense an ancillary suit. It was instituted upon the theory that the proceeding in the District Court for the Southern District of New York in the bankruptcy matter of S. H. P. Pell & Co., discharged Stephen H. P. Pell & Co., as a firm and S. H. P. Pell, Charles A. Kittle and Howland H. Pell from all claims against the firm of S. H. P. Pell & Co., but that it also discharged therefrom Robert M. Thompson. But this is to lose sight of the terms of the composition which provided for the release of Thompson 'from any and all liability to any creditor of S. H. P. Pell & Co. who shall assent hereto, on account of any connection of said Robert M. Thompson with said firm or any transaction of said Robert M. Thompson by or through said firm.'
>
> "The release of Thompson was to apply only to those who specifically assented thereto. And there is no allegation anywhere in the complaint in the present action that the defendants herein assented to the composition."

This entirely overlooks the additional specific provisions of the release of Thompson, quoted at length above (pp. 23, 24).

The fallacy of this language of the opinion lies in its appeal to the offer of composition to limit the terms of the decree. Admitting for the purpose of argument only, that the Bankruptcy Court committed error in its decree of release, that can only be corrected by appeal or revision and not by collateral attack.

Where the meaning and provisions of a judgment are clear and definite, it cannot be altered or changed by anything within the judgment roll.

23 *Cyc., Title Judgment,* p. 1534, note 83.

The terms of the composition cannot possibly limit the express language of the decree releasing Thompson.

It cannot be assumed that the McCabe firm did not assent, the decree does not so recite and it does release Thompson from *all* further liability.

It was not necessary to allege in the bill that the McCabe firm assented, the question of the sufficiency and extent of the assents to carry the compromise with Thompson into effect, was peculiarly a question for the Bankruptcy Court, and its release was not limited by the terms of the composition, but was absolute in form, and it reserved no rights in anybody against Thompson. If assent was necessary, the decree implies assent sufficient to justify the absolute and unreserved release of Thompson by the compromise with him.

We respectfully submit that this also fails to meet the issue raised by the demurrer.

Thompson's Position.

The Circuit Court of Appeals (p. 143), says that the question whether Thompson was a special or general partner was not adjudicated, although it shows (p. 136) in its summary that this matter was in dispute and involved in the settlement. But however that may be it cannot be denied *in this suit* for the purposes of the demurrer that he was merely a special partner as he alleges (Bill, p. 5).

As such special partner all his obligations to any and every creditor of the firm, whether tort or contract, were measured by his making his agreed contribution to the capital of the partnership. That he did this to the full legal limit is implicit in the settlement and decree of confirmation thereof, and hence he is immune from successful attack by any creditor of the firm, however the alleged right of such creditors arose against the firm.

It is not the discharge of the *debt* of the Pell firm to the McCabe firm upon which the plaintiffs necessarily rely, but the complete discharge of Thompson from all liability of every sort by his settlement with the receivers, approved by the Court. For that purpose the receivers represented every right of the firm and those claiming under it against Thompson in respect to his obligations for firm debts upon any and every cause of action whatsoever.

It is not the "discharge in bankruptcy" in the ordinary acceptance of that term upon which Thompson relies in this suit, but the discharge of his entire liability to the firm and the estate and to the receivers, effected by his own compromise, release and settlement, *not* alone with the creditors who assented to the composition, or who proved their claims, or who had provable claims, but with

every person whomsoever who could claim against the firm or any of its members, or its assets, or its receivers or hold him in any way answerable for any obligations of the firm. For that purpose the receivers could and did, with the approval of the Court, release Thompson from every claim for any transaction of the firm.

The complaint in South Carolina (Bill, pp. 100, 103) asserts a firm fraud; the liability asserted is by reason of the alleged wrong of the partnership; it may be that the claim for that fraud of the firm was not discharged by the effect of the technical discharge of the bankrupts, but it is, nevertheless, a firm obligation, and though it may survive a discharge in bankruptcy, it did not survive against a special partner after he had settled a dispute as to his obligations to the firm with the receivers of the firm and his settlement had been ratified and approved by the Bankruptcy Court.

The Court in Bankruptcy had the power to appoint the receivers to take charge of the property of the bankrupts, to authorize their business to be conducted, to bring in Thompson as an additional party as necessary for a complete determination of a matter in controversy (namely, his relations to the firm, the estate and the bankrupts), to cause the estate of the bankrupts to be collected and to *determine* controversies in relation thereto.

> *Bankruptcy Law, Section* 2 (Act 1898, July 1, as amended February 5, 1903, June 25, 1910.)

Of these powers, *Collier on Bankruptcy,* 11th Ed., 1917, p. 67, says (in respect to bringing in parties):

> "This power is an important one in bringing about a *complete determination* of the rights of all parties interested in the property subject to the proceeding."

And again:

> "The power to bring in additional parties as conferred by this subdivision (6 of Sec. 2) is sufficiently broad to permit the bringing in of any person who has *any* claim or interest which may be properly determined in the proceedings."

The Denial of the Ancillary Jurisdiction.

The ground upon which the Circuit Court of Appeals denied the existence of an ancillary jurisdiction applicable to this cause was, that the composition limited the discharge to those who assented thereto (Opinion, p. 10) and that it is not alleged that the defendants assented.

This illustrates the confusion pointed out (*supra*, p. 18) between the existence of jurisdiction and the existence of facts to justify its exercise.

This conclusion overlooks three considerations:

1. That there may be and was an "assent" by their knowledge and silence or failure to oppose (*infra*, p. 48).

2. That Thompson (whose special partnership is admitted by the demurrer) secured a complete release by contract with the receivers and the court, of a disputed controversy respecting his obligation to and for the firm, and an effective adjudication of a matter in issue within the jurisdiction of the Bankruptcy Court, to wit: that he was not a general partner and not liable for the debts of the firm; that such adjudication was not a mere non-

suit, but founded upon an effective *retraxit* (*infra*, p. 35), and that it bound all creditors whomsoever of the firm, by virtue both of the contract with the receivers and its ratification by the Court and by the confirmation of the composition.

3. That the decree in terms discharged Thompson from all liability (*supra*, pp. 23, 24), and if this was error it cannot be reviewed in this suit.

The Errors of Law.

In these matters these petitioners contend that the Circuit Court of Appeals erred in the following respects:

I. Regarding Thompson as a special partner, it is a necessary implication of his settlement with the Receivers (pp. 74-91) and of the decree confirming the composition (pp. 92-98, 51-73), that Thompson was fully discharged against all the world for all liability to or for the firm (*infra*, p. 32).

II. Whether Thompson was in a fact a general or a special partner, the settlement and decree protects him against the defendants' alleged claim, for they knew of the proceedings (p. 9); they made no claim as creditors, but accepted the status of debtors, by paying their scheduled debt of $261.52 (p. 9), and cannot afterward change their position to the disadvantage of Thompson, who withdrew his scheduled claim of $3,373,082.30 in the settlement (p. 10; *infra*, p. 46).

III. The ancillary jurisdiction invoked exists and should have been exercised (*infra*, p. 50).

POINTS.

I.

Regarding Thompson as a special partner, it is a necessary implication of his settlement with the receivers and of the decree confirming the composition that Thompson was fully discharged against all the world for all liability to or for the firm of S. H. P. Pell & Co.

The demurrer necessarily admits the allegation of the Bill (p. 5) that Thompson was a special partner. The law of New York (*supra*, p. 22) determines the extent of his liability as such.

The dispute as to his relationship and liability having arisen in the bankruptcy proceedings, the settlement with the receivers (pp. 74-88) and its ratification by the order of January 6, 1915 (pp. 89-91), and the offer of composition (pp. 51-73), and the order of confirmation (pp. 92-98), effectually adjudicated the facts in issue, dismissed the petitions against Thompson (pp. 57, 58, 94) and in effect adjudicated all of his duties and obligations to or for the firm, and released all others (pp. 95-96).

IN THIS RESPECT THE DECREE IN QUESTION IS A DIRECT ADJUDICATION, BECAUSE IT PROVIDES (p. 98):

> *"It is further Ordered, Adjudged and Decreed* that the intervening petitions filed herein by Logan & Bryan and by Heineken & Vogelsang and others, shall be and they are hereby dismissed."

The dismissal of these petitions is *a judicial demonstration* that the status of Thompson as determined by the Bankruptcy Court was not that of a

general partner, and the attempt to hold him now as a general partner in the South Carolina action, in face of the dismissal of the petition, is a *bald* attempt to *relitigate* this *particular* question.

U. S. v. *Cal. & Ore. Co.*, 192 U. S., 355.

In *Union Bank* v. *Geary* (5 Peters, 99, at p. 114) Mr. Justice Thompson says:

> "The consideration alleged in the bill is relinquishing all defense in the action and confessing a judgment; averring that the complainant had a valid legal defense, which would have defeated the right of the bank to recover on the indorsement, no due and legal demand having been made of the maker, and notice thereof given to the indorser. * * * And to permit a subsequent judicial decision on this point in their favor, as having a retrospective effect, so as to annul a settlement or agreement made by them under a different state of things, would be sanctioning a most mischievous principle."

In *Re First Nat. Bank* (152 Fed. Rep., 64, at p. 70) Sanborn, Circuit Judge, says:

> *"The adjudication is therefore a demonstration* that the court below adjudged that the Widell Company was thus engaged, since it could not have lawfully made the adjudication without such a decision. That judgment, therefore, conclusively estops the complaining creditors here and everywhere from proving the contrary to avoid the adjudication in bankruptcy until the latter is reversed or vacated in some direct proceeding. *Dowell* v. *Applegate*, 152 U. S., 327, 340; *Foltz* v. *St. Louis & S. F. R. Co.*, 60 Fed., 317, 319; *Board of Commissioners* v. *Platt*, 79 Fed., 567, 570."

In *Re Swofford Bros.* (180 Fed. Rep., 549, at p. 557) Van Valkenburgh, District Judge, says:

> "This option rested with the creditors and their representatives in the court. *The release of Swofford was a substantial feature of the agreement.* Whatever rights against him may have existed in others beside the creditors had vested in the trustee in bankruptcy, *and a release by this court was complete and absolute.* * * * It will not do to say that the court of bankruptcy, through its referee and trustee, may have made a bad bargain, or may have acted unwisely. *No court can recognize such a criticism in a collateral proceeding.* Moreover, if such considerations are to be urged, it must be in the same court where the matters were litigated by seasonable and appropriate application to that tribunal. There, and not elsewhere, the remedy, if there be one, lies."

In *Hall* v. *Ames* (182 Fed. Rep., 1008, at p. 1014) Putnam, Circuit Judge, says:

> "But it is insisted that relief is sought for here which was not in issue before the Supreme Judicial Court of Maine, or not disposed of by it. *All these propositions are met by the fundamental fact that we could not get at those additional issues without walking over the body of what has been decided by that court, or held in reserve by it.* We are not at liberty to restrict in any way the powers of that court over the subject-matter involved here, either directly or indirectly, with reference to what has been done or has not been done, or by anticipating what may or may not be done. This is a fundamental rule, stated in *Memphis City* v. *Dean,* 8 Wall., 64."

Under Section 27*a* of the Bankruptcy Law the Court had absolute power to make the compromise, and under Subdivisions 7 and 15 of Section 2 to determine the entire *controversy*.

THE DISMISSAL OF THE INTERVENING PETITIONS UPON WHICH THE ADJUDICATED SETTLEMENT WAS BASED WAS A *retraxit* AND THE CONFIRMED COMPROMISE IS AN ADJUDICATION THAT THOMPSON WAS NOT A GENERAL PARTNER, AND THAT ALL CONTENTIONS THAT HE WAS LIABLE TO THE BANKRUPT ESTATE AND ITS CREDITORS WERE JUDICIALLY DETERMINED BY THE DISMISSAL.

23 *Cyc.*, Tit. *Judgment, Retraxit* 1138, note 43.

United States v. *Cal. & Ore. Co.*, 192 U. S., 355.

In *United States* v. *Parker* (120 U. S., 89, at p. 93) Mr. Justice Matthews says:

> "It is stated, by way of recital in the judgment itself, that it thus appeared to the court 'that the subject-matter in this suit has been adjusted and settled by the proper parties in Washington.' This recital, together with the judgment founded on it, was entered by the consent of the attorney representing the United States, who thus in open court officially admitted the effect of the evidence to be as claimed."

At page 95, Mr. Justice Matthews says:

> "But a non-suit is to be distinguished from a *retraxit*. *Minor* v. *Mechanics Bank*, 26 U. S., 1 Pet., 46. Blackstone defines the difference as follows: 'A *retraxit* differs from a non-suit in this: one is negative and the other positive. The non-suit is a mere de-

fault or neglect of the plaintiff and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open, voluntary renunciation of his claim in court, and by this he forever loses his action.' 3 *Bl. Com.*, 296. And it has been held that a judgment of dismissal, when based upon and entered in pursuance of the agreement of the parties, must be understood, in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy, by the parties themselves through the judgment of the court, as will constitute a defense to another action afterwards brought upon the same cause of action. *Bank of Commonwealth* v. *Hopkins*, 2 Dana, 395; *Merritt* v. *Campbell*, 47 Cal., 542. It is clearly so when, as here, the judgment recites that the subject-matter of the suit had been adjusted and settled by the parties."

THE CONTRACT BETWEEN THE BANKRUPTCY RECEIVERS AND ROBERT M. THOMPSON, IN REALITY THE "CONTRACT OF THE COURT," WHICH SHOULD CERTAINLY BE MAINTAINED FREE FROM ATTACK, WAS MADE BY THE ORDER OF JANUARY 6, 1915, DIRECTING THE RECEIVERS TO EXECUTE THE AGREEMENT OF SETTLEMENT AND CONFIRMED BY THE DECREE OF JANUARY 25, 1915.

American Bonding Co. v. *B. & O. Ry. Co.* (C. C. A., 6th Circuit), 124 Fed., 866, 877.

"The court should be chary of promise, but eager of performance. * * * In other words, it owes to the holders of its contracts not the duty merely of providing the form in which such holders may enforce performance, it owes performance."

Brewer, *J.*, in

> *Farmers L. & T. Co.* v. *Burlington, Etc.*, 32 Fed. Rep., 805, 808, cited *as text* in *Beach on Receivers* (Alderson's Ed.), Sec. 329.

In *Re Hollingsworth & Whitney Co.* (C. C. A., 1st Cir.; 242 Fed. Rep., 753, at p. 756), Dodge, Circuit Judge, says:

> "The company contends that specific performance of said agreement could not be enforced by summary process in the bankruptcy court. But the agreement was unmistakably made with officers of that court appointed by it in a pending bankruptcy case, and it can only be regarded as made and approved by the court for the purposes of that case. An agreement so made is to be regarded as an agreement with the court wherein the case is pending."

See the extent to which this principle has been carried in

> *Farmers L. & T. Co.* v. *Newman*, 127 U. S., 649.

The application of the receivers (pp. 74-88) submitted to the Bankruptcy Court presented a controversy in bankruptcy for judicial consideration and equitable relief, viz.:

> 1. That the creditors claimed that Robert M. Thompson *was a general* partner of the bankrupt firm and that the aggregate assets of the firm and partners, including Thompson, was insufficient to pay the firm creditors and had filed petitions to have him declared a general partner in involuntary bankruptcy.

2. That Robert M. Thompson asserted that he *was a special* partner and denied liability to the creditors and asserted that he was a scheduled creditor to the extent of $3,373,082.30.

3. That there were securities claimed by Robert M. Thompson which had been pledged by the bankrupt firm to secure loans made by divers financial institutions to the bankrupt firm aggregating $2,100,000, and which were about to be foreclosed, threatening the bankrupt estate with large deficiencies.

4. That it was for *the best interests* of the creditors—

1. That the creditors' claim against Thompson be withdrawn and the petitions against him be dismissed.

2. That Thompson redeem the securities by paying off the loans and indemnifying the bankrupt estate against loss.

3. That Thompson withdraw his claim for $3,373,082.30 and release the bankrupt estate.

5. That the receivers petition the Bankruptcy Court for leave to enter into an agreement with Thompson in performance of the arrangement to effect the settlement of all disputes and differences.

Accordingly, with the *consent* of the statutory majority of the bankrupts' creditors, the Bankruptcy Court made the order of January 6, 1915, under which Robert M. Thompson paid off the bankrupts' liabilities of $2,100,000, and withdrew

his claim for $3,373,082.30, and released the bankrupt estate therefrom.

This clearly was a litigation of the issue of general and special partnership settled and compromised by the sanctioned obligation or contract of the Bankruptcy Court through its receivers with Robert M. Thompson.

Of the duty to maintain the unimpeachable integrity of that obligation the Courts have spoken in no uncertain terms.

> *In re Swofford, Etc., Co.*, 180 Fed. Rep., 549, at pp. 556-557.
> *Graham* v. *B. H. & E. R. R.*, 118 U. S., 161, 180.

Express notice to the firm creditors of the proposed settlement and compromise with, and dismissal of the bankruptcy proceedings against, Robert M. Thompson was given by incorporating it in the offer of composition, of which the decree of January 25, 1915, finds:

> "Such composition has been accepted by a "majority in number * * * and amount * * * "and is for the best interests of the cred- "itors. * * *
>
> "Due notice having been given as required "by Section 58a (3) of said bankruptcy act. * * *
>
> "ORDERED, ADJUDGED AND DECREED that it is "for the *best interests of the estate and of the* "*creditors* that the settlement with Robert M. "Thompson set forth in said offer of composi- "tion * * * shall be made * * * and thereupon "the said Robert M. Thompson shall be relieved "of any further liability to the said receivers "or to the estate. * * *"

IT IS CHARGED IN THE BILL (p. 9) AND ADMITTED BY THE DEMURRER THAT THE DEFENDANTS HAD FULL KNOWLEDGE OF ALL THE PROCEEDINGS IN BANKRUPTCY, BUT AT ALL EVENTS NOTICE WAS UNNECESSARY.

In *Matter of Abrams & Rubins* (23 Am. B. R., 25, at p. 26; 173 Fed. Rep., 430, at p. 431) Hand, District Judge, says:

> "It is quite clear that one who knows he is not included in the schedules takes his own risk of a composition's being made and confirmed without his being included. *Re Rudwick*, 93 Fed., 787."
>
> *Knapp* v. *Harold*, note, 11 Am. B. R., 190, note; 25 Ohio Cir. Ct. Rep., 213, note.
> *Cohen* v. *Pinkus*, 126 App. Div., 792; 20 Am. B. R., 787.

In *Re First Nat. Bank* (152 Fed. Rep., 64, at p. 71) Sanborn, Circuit Judge, says of the Bankruptcy Law:

> "The theory of the bankruptcy law is that estates should be converted into money and distributed among the creditors as speedily as practicable. *After a proceeding under it is commenced, the relations of the parties and the nature of the property involved are subject to frequent and rapid changes. Hence creditors who would assail the adjudication or the other orders of the court, and would thereby stop the transformation of the property of the bankrupt and its distribution among his creditors, should act with reasonable promptness after they receive notice of the proceeding and of the reasons of their objection.*"

In *Re Marion, Etc., Co.* (D. C., 166 Fed. Rep., 618, at p. 620) Evans, District Judge, says of those having knowledge with the right to participate:

> *"Having this knowledge and this right under the act, they became quasi parties to the proceeding at least sufficiently to make it the duty of each then, or within five days thereafter, to intervene or be foreclosed of the right to do so."*
>
> *Collier on Bankruptcy,* 11th Ed., p. 860.

THE DEFENDANTS HEREIN ARE BOUND BY THE DECREE OF JANUARY 25, 1915, AS PARTIES THERETO, BY REPRESENTATION THROUGH THE RECEIVERS AND THE BANKRUPTCY COURT ITSELF IN BEHALF OF ALL PARTIES (CREDITORS AND BANKRUPTS) INTERESTED IN THE SETTLEMENT OF THE CONTROVERSY.

In *Re Gottlieb & Co.* (D. C., 245 Fed. Rep., 139, at p. 145) Rellstab, District Judge, says:

> *"Adjudication having taken place, the receiver was no longer merely a custodian of property which might be ordered returned to the alleged bankrupt, but of property which was then in the course of administration.*
>
> In addition to the duties devolving upon him as a preserver of property actually in his possession, *he would be a proper person, pending the appointment of a trustee, to carry out any orders that the court might make for the enforcement of the provisions of the Bankruptcy Act under Section 2, subd.* 15."

In *Grasselli Chem. Co.* v. *Aetna Ex. Co.* (C. C. A., 2nd Circ., 252 Fed., 456, at p. 460) Manton, Circuit Judge, says:

> "A mistaken notion seems to exist with the appellants that the receivers are appointed for the sole benefit of creditors and are not interested in the benefits to accrue to all other parties interested, such as stockholders. In *Atlantic Trust Co.* v. *Chapman*, 208 U. S., 360, the court said that a receiver
>
> 'is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause.'
>
> The possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately judge to be entitled to it. *Porter* v. *Sabin*, 149 U. S., 473."

The bill (Exhibit 7, p. 82) shows that the Bankruptcy Receivers and the bankrupts' creditors, whose claims aggregated $2,300,000 out of a totality of $2,500,000 (exclusive of Thompson's claim of $3,373,082.30) and aggregating 160 in number of a totality of 285 creditors, were in favor of the execution by the Receivers of the Agreement to be authorized by the Bankruptcy Court, which was for

> "The settlement of all questions and disputes with said Robert M. Thompson and for the dismissal of said intervening petitions against said Robert M. Thompson" (Exhibit 7, p. 78).

In *Re Swofford Bros. Co.* (180 Fed. Rep., 549, at p. 557) Judge Van Valkenburgh says:

> *"This option rested with the creditors and their representatives in the court.* The release of Swofford was a substantial feature of the agreement. Whatever rights against

> him may have existed in others besides the creditors had vested in the trustee in bankruptcy, *and a release by this court was complete and absolute.*"

In *Painter* v. *Painter* (138 Cal. Rep., 231, at p. 237) Van Dyke, *J.*, says:

> "It is apparent that if a judgment against a receiver, where presented to the court having jurisdiction of the receivership proceeding for payment, may be modified, changed or rejected, the trial of the cause in which it was rendered would be but an empty and useless formality. (*Beach on Receivers*, sec. 721.) Nor does this view conflict with the rule relied on by appellants, that a judgment is only conclusive against parties and privies. The receiver represented creditors and the partners. It was not necessary to the conclusiveness of the judgment that the surviving partner and all the creditors, if there were such, as is alleged in defendants' answer, should be made parties to the action against the receiver; nor was it necessary that they should be made parties to the petition for an order to enforce payment."

The approval of the settlement made by the receivers and further set forth in the offer of composition *was carried into the order of the Court* (Decree of January 25, 1915) and upon the faith of the execution of the settlement theretofore made and concluded, the intervening petitions against Robert M. Thompson were dismissed (Complaint, Par. 15, p. 11).

23 *Cyc.*, 1248, and cases in Note 48.

In *M'Clelland* v. *Rose* (C. C. A., 5th Circuit, 247 Fed. Rep., 721, at p. 726) Walker, Circuit Judge, says:

> "Whether that suit has or has not passed beyond the stage at which individuals who were parties to it only by representation may intervene and claim the right to be heard, such individuals may not avoid the effect upon them of the decree rendered in favor of the appellant by resorting to another jurisdiction for a relitigation of the questions passed on in that suit.
>
> *American Steel & Wire Co.* v. *Wire Drawers', etc., Union* (C. C.), 90 Fed., 598, 606, 607; *Sharon* v. *Terry* (C. C.), 36 Fed., 337; *Alger* v. *Anderson* (C. C.), 78 Fed., 729, 733; *Cornue* v. *Ingersoll*, 176 Fed., 194."

See also *Cotton* v. *Smith* (144 Missouri Appeal Rep., 169, at p. 173).

FOR THE PURPOSES OF THE PRESENT BILL THE PROCEEDINGS IN BANKRUPTCY MUST BE TREATED AS IN ALL RESPECTS VALID.

Abbott v. *Anderson*, 184 Ill. App., 598, at pp. 613-614:

> "In our opinion this position amounts to a collateral attack on the judgment of the bankruptcy court confirming the composition and is untenable. The bankruptcy court had jurisdiction to enter the order, even admitting for the sake of the argument only, that it may have *erred* in so doing without previously having adjudged the members of the partnership individually bankrupt.
>
> No appeal was taken from that order and, until reversed in a direct proceeding, it is *res adjudicata*" (citing authorities).

Hull v. *Burr*, 206 Fed. Rep., 1, at p. 3.

Hall v. *Ames*, 190 Fed. Rep., 138, at p. 141, s. c., 182 Fed., 1008.

Riverdale Cotton Mills v. *Alabama & G. Mfg. Co.*, 198 U. S., 188, at pp. 197, 198, Brewer, *J.*

In *Matter of Sage* (224 Fed., 525, at p. 532; 35 Am. B. R., 436, at pp. 446-447) Dyer, District Judge, says:

> "In view of the nature of the present proceedings, the court has given very careful consideration to the irregularities just referred to, with a view to determining whether they constitute jurisdictional defects which render the adjudication void, or on the other hand, should be treated as mere errors of procedure, which might have been availed of upon direct review, but are not available collaterally. As the petition in bankruptcy contained all the requisite jurisdictional averments, and as the United States District Court in which it was filed had jurisdiction of the subject-matter, and acquired jurisdiction of the parties by virtue of the filing of the petition and the appearance of the bankrupt, the creditors of the bankrupt not being entitled under the law to any other notice than such as is imparted by the filing of the petition, and as it appears that no party in interest has directly questioned the validity of the order of adjudication, the court has reached the conclusion that this order should be treated as valid and not open to collateral attack in this proceeding" (citing authorities).

In *Re Hecox* (C. C. A., 8th Cir.; 164 Fed., 823, at p. 825; 21 Am. B. R., 314, at p. 317) Philbin, District Judge, says:

> "Until avoided in a direct proceeding thereof, that adjudication was binding and conclusive on the bankrupt and creditors, as much so as a judgment, *inter partes*, on due hearing in a court of competent jurisdiction. *In re American Brewing Co.*, 112 Fed., 752; *In re Knight* (D. C.), 125 Fed., 35; *In re First National Bank*, 152 Fed., 65."

II.

Even regarding Thompson as a general partner, the settlement, order ratifying it, offer of compromise and order of confirmation discharged him from all liability of whatsoever nature to the defendants for any obligations of the firm of S. H. P. Pell & Co.

The demurrer admits that Thompson was a special partner (*supra*, p. 32), and the proceedings in bankruptcy determined that issue (*supra*, p. 36). But even if he were a general partner, Thompson would be released because:

The settlement ratified by the Court effectually disposed of his liability to contribute for the payment of firm debts (*supra*, p. 37).

The decree of confirmation, in view of the settlement expressly released him (*infra*, p. 47).

The defendants, by failing to object, "assented" to the composition agreement, and having acknowledged the status of debtors, upon the basis of which Thompson effected the settlement, they cannot now change their position to his disadvantage.

The decree of confirmation in view of the settlement and its ratification expressly released Thompson.

The decree confirming the compromise contained the following:

> *"Ordered, Adjudged and Decreed that it is for the best interests of the estate and of the creditors thereof that the settlement with Robert M. Thompson set forth in said offer*

> *of composition and the transfer of the property to him referred to in said offer, shall be made,* * * * and THEREUPON THE SAID ROBERT M. THOMPSON SHALL BE RELIEVED OF ANY FURTHER LIABILITY TO THE SAID RECEIVERS OR TO THE ESTATE BY REASON OF THE ORDER HERETOFORE ENTERED BY THIS COURT DATED JANUARY 6, 1915, OR OTHERWISE * * *" (Complaint, p. 95).

In *Re Swofford Bros. Dry Goods Co.* (180 Fed., Rep., 549, at pp. 556, 557) Van Valkenburgh, District Judge, says:

> "In this case the trustee had assets of the bankrupt to dispose of and among them were claims against the petitioner Swofford. These claims were civil in their nature. They were the subject of sale, compromise, or adjustment for the benefit of the creditors. Swofford made an offer which was accepted. *Both he and the court are carrying out the terms of their contract. His release from these claims was as much a consideration moving to him as any piece of tangible property purchased from the trustee."*

The defendants, by failing to object, "assented" to the composition agreement.

McCabe & Company *"assented"* to the composition agreement.

In *Cowen* v. *Paddock,* 62 Hun, 622 Mem. (reported in full in 17 N. Y. Supp., 387), Mr. Hamilton Odell, the referee, reviews the definitions of *assent,* and sums up by citing:

> "In *Husted* v. *Mathes* (77 N. Y., 309), the Court said that consent may be implied from knowledge and that in the absence of any objection silence may be deemed sufficient evidence of assent."

In *Peo.* v. *Dong Pok Yip* (164 Calif., 143, at p. 147) the Court says:

> " *'Consent'* differs very materially from *'Assent.'* The former implies some positive act and always involves submission. The latter means mere passivity or submission."

The defendants having acknowledged the status of debtors upon the basis of which Thompson effected the settlement, they cannot now change their position to his disadvantage.

The withdrawal of Thompson's claim of $3,373,-082.30 was not made until the defendants had accepted their status of scheduled debtors (p. 10) by paying $261.52 to the receivers in bankruptcy (p. 9). It is not alleged that Thompson had personal knowledge of the alleged fraud. It is inequitable that defendants should afterward change their position to Thompson's disadvantage.

Innocent parties were held estopped by their conduct in:

Gloucester Bank v. *Salem Bank,* 17 Mass., 32 (cited with approval in *Leather Manufacturers Bank* v. *Morgan,* 117 U. S., 96).

Manufacturers & Traders B'k. v. *Hazard,* 30 N. Y., 226.

Continental Nat. Bank v. *N. Bank of the Com. Wealth,* 50 N. Y., 575.

Gilbert v. *Groff,* 28 Hun, 50.

III.

The ancillary jurisdiction invoked exists and should have been exercised.

The general principles are correctly enunciated in the opinion of the Circuit Court of Appeals (*supra*, p. 19), but they were misapplied.

In the recent case of *St. Louis & San Francisco R. R. Co.* v. *McElvain*, 253 Fed. R., 123 D. J., E. D., Mo., the grounds of jurisdiction of dependent suits were enumerated by Sanborn, *J.* at p. 128), who said (p. 135):

> "The jurisdiction and authority have been conferred, and *the duty has been imposed,* upon the federal courts, as has been demonstrated in the earlier part of this opinion, to sustain dependent suits to prevent the relitigation by subsequent suits in other courts of the issues heard and adjudged by the federal courts in original suits *to protect the rights and titles acquired under their decrees in such suits from attacks,* by suits or otherwise, by those bound by such decrees, when such suits are founded on the theory that the adjudications of the federal courts were illegal or ineffective, and to use their injunctions and writs of assistance to effect this prevention and protection, and they may not lawfully renounce this jurisdiction or disregard this duty."

These petitioners sought to protect the rights and titles acquired by Thompson in virtue of the judicial settlement with him and the release granted to him; he at least should have been so protected (Points I and II above).

Such auxiliary jurisdiction exists in the Court as a court of equity, though the order of compromise was in bankruptcy.

> *Dewey* v. *West Fairmont Gas &c. Co.*, 123 U. S., 329.
> *Beach* v. *Macon Grocery Co.*, 116 Fed. R., 143.

The reasoning of the Circuit Court of Appeals was (Opinion, pp. 142 *et seq.*) that the suit cannot be regarded as an ancillary suit, because

> "the composition agreement limited the discharge to those who should assent thereto,"

whereas, as we have already shown (*supra*, pp. 32 *et seq*), *in this suit* Thompson must be treated as a special partner whose complete obligation to and for the firm was determined in and concluded by the proceedings in bankruptcy and he was completely discharged from all obligations whatsoever and to whomsoever for his relations with the firm, by his contract, approved by the Court, supplemented by the order of confirmation (Exhibit 9. pp. 92-98).

The Circuit Court of Appeals further reasoned that the South Carolina suit was predicated upon an allegation of newly discovered fraud, and the claim was, therefore, not discharged in bankruptcy, thus ignoring the fact that Thompson's discharge was from all obligation whatsoever (*supra*, p. 23), and that the McCabe firm had, first, induced Thompson's action by posing as a debtor (*supra*, p. 47) and even after full knowledge of the facts which they alleged, made no application to the Bankruptcy Court for any relief to modify the effect of the release.

While the opinion of the Circuit Court of Appeals considers that the bill is without equity, that is an inconclusive view, because they dismissed for want of jurisdiction and not for want of equity. The bill, however, had equity, as we have shown above (pp. 32-46).

A.

The primary jurisdiction of the Bankruptcy Court was adequate to support the ancillary jurisdiction.

Hitherto we have assumed under Points I and II that the bankruptcy proceedings were valid; we shall now demonstrate it.

THE FILING OF THE PETITIONS IN INVOLUNTARY BANKRUPTCY IN THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK BROUGHT THE PROPERTY OF THE BANKRUPTS (*firm* AND INDIVIDUAL), WHEREVER SITUATED, INTO *custodia legis*, AND THAT COURT THUS ACQUIRED THE FULL RIGHT TO PASS ADJUDICATION AND ADMINISTER THE ESTATE.

Lazarus v. *Prentice*, 234 U. S., 263, 266.
Acme Harvester Co. v. *Beekman Lumber Co.*, 222 U. S., 300.
Mueller v. *Nugent*, 184 U. S., 1.
Knauth v. *Latham*, C. C. A., 5th Cir., 219 Fed., 721, at page 722.

THE BANKRUPTCY COURT ACQUIRED JURISDICTION OVER ROBERT M. THOMPSON INDIVIDUALLY BY

(1) The filing of the petitions of November 28, 1914, to have him declared to be a general

partner and adjudicated an involuntary bankrupt (Bill, pp. 26-45).

Subpoena was issued and served upon Robert M. Thompson (Bill, pp. 46-47).

It exercised its jurisdiction by

(2) The seizure by and possession of the bankruptcy receivers of property *then* in the bankrupts' possession, which was claimed by Robert M. Thompson, and for the release of which he petitioned the Bankruptcy Court (Bill, pp. 7, 77).

(3) The settlement made with the sanction of the Bankruptcy Court by Robert M. Thompson, the Bankruptcy Receivers and the firm creditors (majority in amount and number) and the express stipulation of Robert M. Thompson to abide by and carry out the orders of the Bankruptcy Court (Complaint, pp. 9-11, 75-91).

Since the proceedings in the Bankruptcy Court terminated in a decree which released Thompson from his obligations to and for the firm (*supra*, p. 23), and which discharged firm debts, that decree cannot be disregarded by the McCabe firm nor collaterally attacked by them, and the Court which rendered it should not suffer it to be disregarded by the South Carolina suit.

In *Re Samuels* (C. C. A., 2nd Cir.; 215 Fed. Rep., 845, at p. 849) Rogers, Circuit Judge, says:

"If under such circumstances the bankruptcy court has no right to inquire and determine whether one who is alleged to be

> a secret partner of the firm against which bankruptcy proceedings are pending, is or is not a member of the firm, and, if he is, whether he is solvent, then certainly the court is left in an anomalous and even an extraordinary situation. *That it is possessed and must be possessed of such power we cannot doubt.*"

See also:

> *Armstrong* v. *Fisher,* 224 Fed., 97, 99, 139 (C. C. A., 8th Cir.).
> *Ft. Pitt Coal & Coke Co.* v. *Diser* (C. C. A., 6th Cir.; 239 Fed. Rep., 443, at p. 447).

The Bankruptcy Court acquired power to adjudicate Thompson's rights, and liabilities to and the rights of the firm creditors against him.

> *In re Howard Co.,* C. C. A., 2nd Circ., 203 Fed., 445, 448.

He was in fact and law made a party to the bankruptcy proceedings by the involuntary petitions, by the proceeding instituted by him in the Bankruptcy Court for the delivery to him of bonds and stocks *in the possession* of the bankruptcy receivers, and by his agreement with the creditors and the receivers and his express stipulation made in open court to abide by and perform the terms of the composition and hold himself amenable to the order of the Bankruptcy Court.

> *In re Swofford, Etc., Co.,* 180 Fed. Rep., 549.

After he acquiesced in and performed the judgment of the Bankruptcy Court, it is not permissible

for third parties to assert lack of jurisdiction over him.

Re Hollingsworth, Etc., Co., C. C. A., 1st Circuit, 242 Fed. R., 753, 756.
Armstrong v. *Norris*, 247 Fed. Rep., 253, C. C. A.

THE BANKRUPTCY COURT ACQUIRED AND RETAINED JURISDICTION OF THE FIRM CREDITORS OF S. H. P. PELL & CO. BY THE ADJUDICATION.

The creditor must either resist the adjudication, or having passively acquiesced in that result, be bound by the orders made by the Bankruptcy Court in the course of administration. The McCabe firm, it will be remembered (Bill, p. 9), had actual knowledge.

THE BANKRUPTCY COURT WAS VESTED WITH PLENARY POWER TO MAKE THE DECREE OF JANUARY 25, 1915.

1. "To *determine the controversy*" between the bankrupts' estate and the firm creditors of S. H. P. Pell & Co. with Robert M. Thompson and to release him upon performance of the determination, whether attained through compromise or final determination of the controversy.

2. To *"cause the estate to be collected and reduced to money"* and compromise the conflicting claims between the bankrupt estate and the firm creditors with Robert M. Thompson and thereupon by its decree to release and discharge Robert M. Thompson from any further liability to the bankrupt estate and the firm creditors.

3. To *confirm the composition* between the creditors and the firm (as an entity) and the members thereof and thereby release and discharge Robert M. Thompson from all individual and other liability as a partner dormant or otherwise unknown to the creditors.

4. To conclusively bind the firm creditors and immediate parties to the bankruptcy proceeding by its decrees and make that decree invulnerable against collateral attack.

THE BROAD GRANT OF JURISDICTION IS CONTAINED IN THE BANKRUPTCY LAW.

The Bankruptcy Law provides:

> "Section 2 provides that the courts of bankruptcy shall have power and authority to
>
> * * * * * *
>
> "(7) 'cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto except as in the act otherwise provided,
>
> * * * * * *
>
> "(15) 'make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.' "

Section 2 further provides and concludes:

> "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Section 27*a* provides:

> "The trustee may, with the approval of the court, compromise any controversy arising

in the administration of the estate upon such terms as he may deem for the best interests of the estate."

Section 47*a* (2) provides that trustees shall

"collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest."

General order 28 provides that:

"Whenever it may be deemed for the benefit of the estate of a bankrupt * * * to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee * * * may file his petition therefor, and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee."

In *Re Siegel-Hillman Dry Goods Co.* (D. C., Mo., 111 Fed. Rep., 980, at p. 986) Shiras, District Judge, says:

"That in cases wherein a court of equity is charged with the distribution of an estate or a fund under its control, and has before it the several parties whose rights and interests are involved in the administration of the estate, it may, disregarding mere matters of form, *but having regard to the substantial rights of all the parties, ascertain the ultimate relation and liability of the several parties, and base its decree thereon, thus avoid-*

> *ing the delay and expense which would be caused if the parties were remitted to the pursuit of their legal rights without aid from a court of equity.*
>
> Cases in bankruptcy, such as that now before the court, are peculiarly within this rule, and call for the exercise of the full powers of the court for the ascertainment and proper enforcement of the equities of the parties; for in no other proceeding can these equities be so well determined and protected as in the bankruptcy proceedings, wherein the court is called upon to enforce the provisions of the act, which provisions largely control the rights of the parties."

A controversy was presented in the Bankruptcy Court as to the liability of Thompson to the creditors of the estate of S. H. P. Pell & Co. upon the creditors' claim that he was a general partner in the bankrupt firm of S. H. P. Pell & Co. against Thompson's contention to the contrary, and that he was a creditor to the extent of $3,373,082.20.

Under Sections 2, 27*a* and 47*a* of the Bankruptcy Law, and General Order XXVIII (*ante*, pp. 56-57), the Bankruptcy Court had the general power to *entertain* and compromise any controversy arising in the administration of the estate.

Under Section 27*a* of the Bankruptcy Law the Court has the general power to compromise any controversy arising in the administration of the estate.

The power to compromise is further extended by General Order XXVIII, so that it seems beyond question that the Bankruptcy Court had the power to authorize its receivers to enter into an agreement of compromise and settlement with

Thompson, which seemed to be for the best interests of the bankrupt estate (236, 285).

(See Section 2, Subs. (7), (15), Bankruptcy Law.)

The Bankruptcy Court had full power to determine the extent of Thompson's liability to the firm and its creditors, and it did so, and discharged him from any further liability than that imposed by its decree; and as the McCabes and Thompson were each parties before the Court or represented by parties, that decree is conclusive and may not be attacked collaterally.

The failure to appoint a trustee (Bankruptcy Law, Secs. 47, 27) or to give a particular notice (*vide*, Sec. 54, General Order VIII), etc., does not oust the jurisdiction of the District Court acquired by the filing of the petitions in the form required by the statute.

But this matter is fully covered by the fact that in this case the Bankruptcy Court had full jurisdiction of the subject-matter and of the person, and made a decree, and therefore however faulty or erroneous its procedure in making its decree may have been, it is not subject to collateral attack.

In *Re Swofford Bros.* (180 Fed. Rep., 549, at pp. 556-557) Van Valkenburgh, District Judge, says:

> "The court and its officers clothed with full authority, upon canvassing the possiblities and probabilities in each individual case, will decide what is best to be done from the standpoint of the creditor, and may, and will, act accordingly. *When they have done so, their acts cannot be reviewed and the matter relitigated in another forum and at the suit of the parties or their privies.*

This court is as bound to protect his acquittance as it is to deliver to him the tangible property he bought. To hold otherwise would be to render unstable and futile all the proceedings of like nature in a bankruptcy court through which the property of the bankrupt is administered and money is realized from which distribution may be made to creditors."

B.

The Court's ancillary jurisdiction of the Bill of Peace praying for injunctive relief.

THE POWER AND JURISDICTION OF THE COURT TO SUSTAIN A BILL PROTECTING PARTIES TO ITS DECREE FROM VEXATIOUS, BASELESS, HARASSING LITIGATION ATTACKING THE TITLE AND QUIETING THE PARTY IN THE ENJOYMENT OF THE RIGHTS VESTED BY FORCE OF THE DECREE IS BEYOND QUESTION.

Thompson v. *Emmett Irr. Dist.*, 227 Fed. Rep., 560, at p. 564.
Riverdale Mills v. *Mfg. Co.*, 198 U. S., 188, 195.
Sharon v. *Tucker*, 144 U. S., 533.
Ritchie v. *Dorland*, 6 Calif., 33, 37-38.
Orton v. *Smith*, 59 U. S., 263.

THE FEDERAL COURT OF EQUITY HAS POWER IN A CASE OF THIS CHARACTER TO ISSUE THE INJUNCTION RESTRAINING THE ACTION AT LAW, NOTWITHSTANDING SECTION 720 OF THE UNITED STATES REVISED STATUTES.

Gunther v. *Atlantic Lines*, 200 U. S., 273, 292.

Julian v. *Central Trust Co.*, 193 U. S., 93, 112.

Riverdale Mills v. *Mfg. Co.*, 198 U. S., 188, 196-197.

In *Kern* v. *Huidekoper* (103 U. S., 494, at p. 497) Mr. Justice Woods says:

> "A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State Court.
>
> As the bill in this case is filed for the purpose of giving to litigants on the law side of the court the substantial fruits of a judgment rendered in their favor, it is merely auxiliary to the suit at law, and the court has the right to enforce the judgment against the party defendant and those whom he represents, no matter how or when they may attempt to evade it or escape its effect, unless by a direct proceeding. These views are sustained by the case of *French* v. *Hay*, 22 Wall., 250 (89 U. S. XXI, 857), between which and this case there is no susbtantial difference."

The Bankruptcy Law does not attempt to restrict the general equity jurisdiction of the District Court. Section 11a merely grants a power to stay *pendente lite* and is a power in addition to the general equity power of a court to restrain interference with its own decrees.

In *Riverdale Co.* v. *Alabama etc. Co.* (198 U. S., 188) Mr. Justice Brewer (at pp. 194-195) says:

> "In other words, a Federal court, exercising a jurisdiction apparently belonging to it, may thereafter, by ancillary suit, inquire whether that jurisdiction in fact existed.

It may protect the title which it has decreed as against every one a party to the original suit and prevent that party from relitigating the questions of right which have already been determined. French v. *Hay,* 22 Wall., 250; *Cole* v. *Cunningham,* 133 U. S., 107; *Root* v. *Woolworth,* 150 U. S., 401." In this case, on page 410, it was said:

"It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments, which remain unreversed, when the subject-matter and the parties are the same in both proceedings."

* * * * * *

"The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to avoid the relitigation of questions once settled between the same parties is well settled. *Story, Eq. Jur.,* Sec. 959; *Kershaw* v. *Thompson,* 4 Johns. Ch., 609, 612; *Schenck* v. *Conover,* 13 N. J. Eq., 220, 78 Am. Dec., 95; *Buffum's Case,* 13 N. H., 14; *Shepherd* v. *Towgood,* Turn. & R., 379; *Davis* v. *Bluck,* 6 Beav., 393. In *Kershaw* v. *Thompson* the authorities are fully reviewed by Chancellor Kent, and need not be re-examined here."

In *Riggs* v. *Johnson County* (6 Wall., 166, 167) it was held that:

"Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purpose for which it was conferred by the Constitution."

See also:

Lamb v. *Ewing,* 54 Fed., 269.

THE PRESENT SUIT IS NOT DEPENDENT UPON THE DIVERSITY OF CITIZENSHIP OF THE PARTIES, BUT PROCEEDS IN EXECUTION AND ENFORCEMENT OF (AS ANCILLARY TO AND DEPENDENT UPON) THE EXISTING DECREE.

McCabe v. *Guaranty Trust Co.* (C. C. A., 2nd Cir.), 243 Fed. Rep., 845.

In *Wabash R. Co.* v. *Adelbert College* (208 U. S., 38, at p. 54) Mr. Justice Moody says:

> "In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy."

See also as additional illustrations of the extent and nature of ancillary jurisdiction:

Julian v. *Central Trust Co.* (193 U. S., 93, at pp. 113-114).

Brun v. *Mann* (151 Fed. Rep., 145, at p. 150).

Hatcher v. *H. & B. Co.* (C. C. A., 8th Circ.; 133 Fed. Rep., 267, at pp. 269-270).

In *Sherman Nat. Bank* v. *Shubert Co.* (C. C. A., 2d Circ.; 247 Fed. Rep., 256, at pp. 258-259) Ward, Circuit Judge, says:

> "But it is filed, among other things, to stay the action at law, and so is connected with and ancillary to it. The jurisdiction of this court over the action at law by virtue of the citizenship of the parties extends to the ancillary bill. *Minnesota Co.* v. *Soutter*, 2 Wall., 609; *Krippendorf* v. *Hyde*, 110 U. S., at p. 284."

JURISDICTION TO ENFORCE THE ORIGINAL DECREE CONTINUES, NOTWITHSTANDING THE SUBJECT OR "RES" OF THE FORMER SUIT MAY HAVE PASSED OUT OF THE POSSESSION OF THE COURT IN THE PERFORMANCE OF ITS DECREE.

Wabash R. Co. v. *Adelbert College*, 208 U. S., 38, at pp. 56-57.

Simon v. *So. R. Co.*, 236 U. S., 115, at pp. 124, 125.

Riverdale Mills v. *A. & G. Mfg. Co.*, 198 U. S., 188, at pp. 195, 196.

JURISDICTION IS NOT EXHAUSTED BY THE RENDITION OF THE DECREE AND THE PERFORMANCE OF ITS MANDATE, BUT CONTINUES AND MAY BE INVOKED WHENEVER THE RIGHTS THEREBY CONFERRED ARE ASSAILED.

In *Central Nat. Bank* v. *Stevens* (169 U. S., 432, at pp. 464-465) Mr. Justice Shiras says:

> "But it has been frequently determined by this court that the jurisdiction of a court *is not exhausted by the rendition of the judgment*, but *continues until the judgment shall be satisfied.* Thus it was said in *Riggs* v. *Johnson County* (*United States, Riggs* v. *Johnson County Supers.*), 73 U. S., 6 Wall., 166, that 'process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.'
>
> And in *Amy* v. *Supervisors* (*Amy* v. *Barkholder*), 78 U. S., 11 Wall., 136, it was said: 'The two sets of tribunals—state and national—are as independent as they are separate. Neither can impede or arrest any action the

other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees.'

'An execution is the end of the law. It gives the successful party the fruits of his judgment.' *United States* v. *Nourse*, 34 U. S., 9 Pet., 28. But it is scarcely necessary to quote authorities to show that to deprive a court of the power to execute its decrees is to essentially impair its jurisdiction *'Juris effectus in executione consistit.'* Co. Litt., 289."

See also:

Phelps v. *M. R. F. L. Ass'n*, 112 Fed. Rep., 453, at p. 458.

IT IS NO DEFENSE TO THE BILL THAT THE PLAINTIFFS HAVE AN ADEQUATE REMEDY AT LAW.

In *Gunter* v. *Atlantic Coast Line R. Co.* (200 U. S., 273, at pp. 278-279) Mr. Chief Justice White says:

"Jurisdiction of the court in equity was challenged on the ground that there was an adequate remedy at law. A final decree passed in favor of the complainant, recognizing the alleged exemption, and perpetuating the injunction. An appeal was prosecuted to this court. The cause was decided at the December term, 1872. It was held that there was a contract of exemption, which would be impaired by enforcing the taxes complained of, and hence the decree below was affirmed. *Humphrey* v. *Pegues*, 16 Wall., 244."

At page 283 Mr. Chief Justice White says:

"*First.* We at once treat as undoubted the right of the Atlantic Coast Line Railroad Company to the benefits of the decree in the

Pegues Case, since it is conceded in the argument at bar that that company, as the successor to the rights of Pegues, is entitled to the protection of the original decree rendered in his favor."

At pages 292, 293, Mr. Chief Justice White says:

"*And this reasoning disposes of the contention that the court below erred in enforcing its prior decree because there was adequate remedy at law, by interposing a defense in the state courts to the actions brought by the attorney general. That question was foreclosed by the decree in the Pegues case.* * * Having acquired by that decree a right which the petitioner was entitled to enforce, whatever might have been the rule of tender as applied to other cases, that rule could not rightly be invoked to deprive the court below, as a court of equity, of the power to protect the petitioner in the enjoyment of rights previously secured under a decree of the court."

See also:

Hamilton v. *Alabama Power Co.*, 70 Southern Rep., 737, at p. 737, 195 Ala., 438.

Foltz v. *St. Louis & S. F. Ry. Co.*, 60 Fed. Rep., 316, at p. 322.

The bill was not without equity (*supra*, (pp. 33-49), and the excuses and attempt to differentiate the South Carolina suit are without merit.

IV.

It is respectfully submitted that the writ of certiorari should be granted.

The power to issue the writ of certiorari is indicated in *Brown* v. *Alton Water Co.*, 222 U. S., 313, at page 333, the District Court having dismissed for want of equity as disclosed by its opinion (p. 127), and the Circuit Court of Appeals having modified the decree so as to dismiss without prejudice for want of jurisdiction (pp. 146, 147).

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(No. [redacted]311

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON,
Plaintiffs-Petitioners,

versus

W. GORDON MCCABE, JR., and WILLIAM F. GRAY,
Defendants-Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1918.

(No. 889)

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON,
Plaintiffs-Petitioners,

versus

W. GORDON MCCABE, JR., and WILLIAM F. GRAY,
Defendants-Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This Application.

The petitioners apply to this Court for a writ of certiorari to review a decision of the Circuit Court of Appeals for the Second Circuit, which affirmed a decree of the District Court for the Southern District of New York, dismissing the

bill of complaint of the plaintiffs, the petitioners herein, with a slight modification, viz., that the decree is to be modified to provide "that the dismissal is without prejudice" (Rec. fol. 437).

Facts.

The facts as stated in the petition are incomplete and misleading and such as are stated there are so confused with argument that we believe it our duty to the Court to here make a concise statement of the facts as we understand them to be.

This Suit.

This suit is brought by plaintiffs for the purpose of perpetually enjoining these defendants from

1. Further proceeding in the action now pending in the United States District Court for the Eastern District of South Carolina so far as it proceeds against Robert M. Thompson as a general partner of S. H. Pell & Co., upon any claim which was provable in bankruptcy (fol. 69).

2. From continuing the said action in South Carolina or instituting any other action upon transactions between defendants and plaintiffs (Pell & Co.) or upon the plaintiffs (Pell & Co.) fraud in said dealings which was not at the time known to defendants (fols. 70, 15-17, 44-50).

3. From attacking, questioning or challenging the power and jurisdiction of the United States District Court for the Southern District of New

York to make certain orders mentioned in the complaint and the effect and extent of said orders (fol. 71).

PARTIES.

The plaintiffs herein were members of the firm of S. H. P. Pell & Co., Robert M. Thompson claiming to be a special partner; and the defendants are residents of South Carolina who had transactions with that firm prior to December 23, 1913, wherein they employed said firm to buy and sell cotton on the New York Cotton Exchange (fols. 13-15).

Neither the plaintiffs nor the defendants herein reside within the Southern District of New York within the requirements of the Judicial Code (fols. 12-13).

ACTION IN SOUTH CAROLINA SOUGHT TO BE ENJOINED.

The action now pending in the United States District Court for the Eastern District of South Carolina against these defendants was commenced on or about March 25, 1918, by the service of a summons, personally, upon Robert M. Thompson, one of the plaintiffs herein and one of the defendants in that action (fols. 55, 62-63); said action is for the recovery of moneys obtained from the plaintiffs (the defendants herein) by the defendants (the plaintiffs herein) by fraud and deceit (fols. 300-315). Said action was commenced in the Court of Common Pleas in the State of South

Carolina and was removed by the defendants (the plaintiffs herein) into the United States District Court for the Eastern District of South Carolina where it is now pending (fol. 63).

Plaintiffs-appellants contend that by reason of the proceedings had in the United States District Court for the Southern District of New York in the bankruptcy proceedings of S. H. P. Pell & Co., these defendants cannot maintain an action in South Carolina or anywhere against these plaintiffs and should be enjoined from doing so. The facts with reference to those bankruptcy proceedings are briefly as follows:

PELL BANKRUPTCY.

On August 3, 1914, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York against Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, individually and as members of the firm of S. H. P. Pell & Co. (fol. 17), and said Pell, Kittle and Pell were thereafter adjudicated bankrupts on November 25, 1914 (fol. 26), receivers in bankruptcy in the meantime having been appointed (fol. 19). Two intervening or supplementary petitions were filed on November 23, 1914, and November 28, 1914, respectively, by certain creditors having claims against the firm of S. H. P. Pell & Co., alleging that Robert M. Thompson was a general partner in the said firm of S. H. P. Pell & Co. and demanding that he also be adjudicated bankrupt (fols. 21-23, 82-88, 103-123). Thereafter a composition was offered to their creditors by said

bankrupts, Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, individually and as members of the firm of S. H. P. Pell & Co., which offer also provided that in addition to the discharge of said bankrupts from all their debts, both individual and partnership, the said Robert M. Thompson should be released from liability to any creditor of S. H. P. Pell & Co. "who shall assent to this offer" (fols. 30, 153-154, 161). Said offer was accepted by the majority of the creditors of said bankrupts and was confirmed by order of the United States District Court (fols. 32, 274-294). Said Robert M. Thompson claimed to be a creditor of said firm and claimed various securities of which the receivers had taken possession (fol. 20). The receivers with the permission of the District Court compromised said claim with said Thompson and an order thereon was entered (fols. 265-271).

It was also provided in said offer of composition, and the order confirming same that the intervening or supplementary petitions should be dismissed without costs (fols. 171-172, 292-293).

ACTION IN NEW YORK AGAINST DEFENDANTS.

In June, 1916, an action was commenced in the State Court of New York by the Guaranty Trust Company of New York against these defendants (fol. 44). The Guaranty Trust Company as such plaintiff was acting on behalf and in the interest of Robert M. Thompson, S. H. P. Pell and Charles A. Kittle, three of the plaintiffs herein (fols. 43-44). That action was based on transactions between Pell & Co. and these defendants. A second

action was commenced against these defendants in March, 1917, by the same plaintiff in said capacity on alleged claims assigned to Pell & Co. and by Pell & Co. assigned to said plaintiff. The defendants set up as a defense to those actions substantially the same facts as are the basis for the action now pending in South Carolina and here sought to be enjoined (fol. 55), but defendants asked no affirmative relief there because the plaintiff, Guaranty Trust Co., was suing as assignee of S. H. P. Pell & Co. (fols. 40-44). These defendants removed said actions into the United States District Court for the Southern District of New York, but the plaintiff objected to the removal and objected to said Court taking jurisdiction, and succeeded in having said actions remanded to the State Court (fols. 44, 51).

Issue.

The issue raised below and decided by the decree appealed from is that plaintiffs have not in or by their said complaint made or stated such a case as entitles them in a court of equity to any discovery or relief, and that it appears from the complaint that the U. S. District Court for the Southern District of New York has no jurisdiction of the parties or the subject matter of this suit either as an original action or as an ancillary suit, and that it appears on the face of the complaint that no cause of action exists in favor of these plaintiffs for the relief prayed for, or for any relief from said Court (fol. 345).

Motion for Preliminary Injunction.

While we contend that what occurred on that motion has nothing to do with the question before this Court, the petitioners' counsel seem to think that they derive some benefit from the opinion of Judge Hough on that motion. We shall, therefore, make this brief statement of facts with reference to that motion. The motion for preliminary injunction came on before Judge Hough and was granted by him because in his opinion he could not consider the merits of the application. He, therefore, continued the injunction and set the cause for hearing on a day certain at the head of the Equity Calendar for that day upon the following condition:

> "If before that time defendants appear and answer, or make such motion as may be equivalent to a demurrer, saving their rights to the jurisdictional question sought to be raised under special appearance."

Defendants did before the time specified put in an answer containing a demurrer and then moved for judgment on the pleadings; and after a full hearing upon said demurrer, the District Court dismissed the complaint.

The Decision of the District Court.

The decision of the District Court does not show upon what grounds the dismissal was granted, but provides simply as follows:

> "Ordered, adjudged and decreed that the complaint herein be and the same hereby is

dismissed, with costs to the defendants to be taxed."

And the modification directed in the decision of the Circuit Court of Appeals simply adds "that the dismissal is without prejudice," whatever that may mean. But, a reference to the opinion of the District Court shows that the learned Judge considered the matter fully, both on the question of jurisdiction and on the merits. He refrained from deciding, "whether this bill is within the ancillary jurisdiction of a Court of Bankruptcy or of the District Court as ancillary to the Court of Bankruptcy;" (fol. 374) and based his decision on the ground that "even if all be true that the plaintiffs allege," there is no ground for equitable intervention and the bill is without equity (fol. 378).

DECISION OF THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals considered both the question of jurisdiction and the merits. It says:

> "The Court below found in the bill no ground for equitable intervention, even if all the allegations in the bill contained be assumed as true. We are in full agreement with that court in believing that the bill is without equity. It was properly dismissed" (fols. 436-437).

The Court then adds the following language:

> "And being dismissed for want of jurisdiction the decree is to be modified to provide that the dismissal is without prejudice" (fol. 437).

That this language was not a part of the decision as originally rendered, but was added afterwards is indicated by reference to the original certified copy of the record filed in this Court, where that change is made in ink. Just what this addition or amendment means is beyond our comprehension. But, it will be noticed that it *does not* direct a modification of the decree below so as to provide for a *dismissal for want of jurisdiction.*

There are several inaccuracies in the facts stated in the opinion of the Circuit Court of Appeals. One of the more important being at fol. 409, where by inadvertence there is omitted from the end of paragraph "First" the condition "who shall assent hereto."

POINTS.

I.

The said District Court has no jurisdiction of this suit or of the parties hereto unless it be as a suit ancillary to the proceedings heretofore had in said Court in the matter of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, Bankrupts.

As an Original Action.

It was admitted by plaintiffs that the Court below has no jurisdiction of a suit between the parties hereto as an original action (fol. 383). But, that is necessarily so under the Judicial Code, and it was so held with respect to the very same parties (except Thompson) in the matter of *Guarantee Trust Company vs. McCabe* (250 Fed. R., 699), in which writ of certiorari was denied by this Court, for while the citizenship of the parties does not appear in the bill, it does appear that neither plaintiffs nor defendants are residents of the district in which the suit is brought (fols. 12-14).

As a Suit to Enjoin an Action on a Discharged Debt.

We do not understand that it is specifically contended by plaintiffs that the District Court would have jurisdiction of a suit to enjoin an action in some other court on a debt which was claimed to be barred by a discharge in bankruptcy granted by

said District Court, or the confirmation of a composition and yet that is in substance their contention.

The proper forum to determine whether the debt is one that was discharged is the Court where the action on the debt is pending. Judge HOUGH, in his opinion on motion for temporary injunction in this suit said (fol. 383):

> "As an endeavor to stay a suit against a discharged bankrupt it is also not sustainable."

We will not, therefore, discuss this point at length or go into the question further than to refer to the following cases supporting this proposition:

Hellman vs. Goldstone, 161 Fed. Rep., 913;
Friend vs. Talcott, 228 U. S., 27;
In re Rhutassel, 96 Fed. Rep., 597;
In re Tinker, 99 Fed. Rep., 79;
In re Thomas, 92 Fed. Rep., 912;
Saunters vs. Huntington, 166 Mass., 96;

and, further, to be availed of as a defence, such discharge must be pleaded in the action on the debt:

Consolidated Rubber Tire Co. vs. Vehicle Equipment Co., 121 App. Div., 764; 19 Am. B. R., 862.

In *re Hellman vs. Goldstone,* 161 Fed., 913, where injunction was refused, the Court said:

> "Presumably the Court in which such discharge is thus pleaded will accord it due legal effect, and if it does not the bankrupt's remedy

> lies in a review of such action by the proper Appellate Tribunal, or ultimately in the Federal Court for denial to him of a right under a law of the United States."

In *Friend vs. Talcott, supra,* the Court at page 41 said:

> "Nothing could more clearly emphasize the distinction which exists between the two subjects, that is, the granting of a general discharge, and the question after it is granted whether a particular debt is exempted by law from its operation—than does the provision of the statute (Sec. 14c, 30 Stat. 550), authorizing a general discharge as the result of an approval of a composition, since it expressly reserves from the operation of such discharge of the bankrupt from his debts 'those not affected by a discharge;' "

and at page 42, the Court said:

> "If on the other hand, it be conceded that the composition was rightfully approved, as the determination of that subject did not under the very terms of the statute involve passing upon the separate and distinct claim of creditors to be exempt from the operation of the discharge, it results that in no view of the case is there merit in the contention as to *res judicata.* The contentions urged in many forms based upon the recitals in the order of confirmation of the composition made conformable to the statute as to the absence of fraud or other wrongdoing, etc., is but a reiteration of the contention as to *res judicata* which we have shown to be without foundation."

See also Remington on Bk. (2nd Ed.) pp. 242-3, and cases cited.

In re McCarthy, 111 Fed., 151, the Court said:

> "The effect of such discharge if in the future it shall be pleaded in bar of the collection of the judgment in question will arise in the proper tribunal where such collection is sought to be enforced."

The power of District Courts of Bankruptcy to issue injunctions restraining actions against bankrupts is expressly limited by the Bankruptcy Act to a period "until after an adjudication or the dismissal of the petition, if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or if within that time such person applies for a discharge, then until the question of such discharge is determined."

See Bankruptcy Act, Section 11.

Furthermore, it has been held that even during the period within which the bankruptcy court may enjoin proceedings it cannot do so where the action is in another state, but that such restraining order must be obtained by ancillary proceedings in the District Court in the jurisdiction where the action is pending.

See Acme Harvester Co. vs. Beekman Lumber Co., 222 U. S., 301.

II.

The complaint does not state any facts which authorize or require the Court below to take jurisdiction of this suit as ancillary to any proceedings at any time heretofore had in said Court.

Petitioners contend that the proceedings had in the bankruptcy matter of S. H. P. Pell & Co. had the effect of discharging not only the bankrupts, Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, but also Robert M. Thompson, from all claims against the firm of S. H. P. Pell & Co. With respect to the claims of creditors of that firm who assented to the composition we think that was true. They would have a right to release said Thompson, and if they signed a paper intending to so release him it undoubtedly would do so whether that paper happened to be an offer of composition by certain bankrupts or any other form. But, it certainly could not release Thompson from claims of any creditor who did not assent to it; because Thompson was not one of the bankrupts, he did not make the offer of composition, and did not comply with the requirements of the Bankruptcy Act with respect to bankrupts offering composition. The offer was made by the bankrupts Pell, Kittle and Pell (fols. 153, 174). The Bankruptcy Act provides with reference to compositions, as follows:

> "A bankrupt may offer, either before or after adjudication, terms of composition to his creditors, but not before he has been examined

in open court or at a meeting of his creditors, *and has filed in court the schedule of his property and lists of his creditors,* required to be filed by bankrupts. In compositions before adjudication, the bankrupt shall file the required schedules, and thereupon the court shall call a meeting," etc. (Italics ours.)

Bankruptcy Law, Section 12.

But even if we were to assume, for the purpose of this argument, that said Thompson was to be considered in the same position as the bankrupts, and the offer were assumed to have the broadest possible power in discharging him from all his debts and from all the liability by reason of his connection with said firm of S. H. P. Pell & Co., what does that profit the plaintiffs here, for as we have seen the authorities all hold, their remedy in that event would not be to seek here to enjoin the prosecution of an action in some other court on a debt claimed to be barred by such discharge or composition, but to set up the composition and discharge in the forum where the debt is sued upon.

The plaintiffs seem to think that the proceedings relating to the composition, and that the decree confirming the composition had, in addition to all of its powers as a decree confirming a composition, certain further peculiar and extraordinary virtues which would result in preventing all persons from asserting in any proceedings the liability of Robert M. Thompson to creditors of the firm of S. H. P. Pell & Co. on account of any transactions with said

firm. We submit that this is not so for the following reasons:

(a) It was not intended to be such by the parties offering the composition and who were responsible for its confirmation, and the offer of composition shows on its face that it was not intended to be.

(b) Because it is not possible by even the most strained construction of the order confirming the composition, to convert it into such a decree.

(c) Because a Court of Bankruptcy is a Court of limited jurisdiction and has no powers outside of those necessary for the administration of the bankruptcy act; and there is no provision in the bankruptcy act which authorizes making of any such decree, and a Court will not be presumed to have made an order which would be *ultra vires*.

As to (a).

That the offer of composition was not intended to have any such effect as is now claimed for it is clearly shown by the language of the same (Exhibit 6 to the Complaint herein) which states in the first paragraph, as follows:

"First: This offer is made in consideration of the discharge of the bankrupts, Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, from their debts, both individual and

> partnership, and of the *release of Robert M. Thompson from* any and all liability to said S. H. P. Pell & Co., and from any and *all liability to any creditor* of S. H. P. Pell & Co., WHO SHALL ASSENT HERETO, on account of any connection of said Robert M. Thompson with said firm or any transaction of said Robert M. Thompson by or through said firm" (italics ours).

It will be noted that this provides for the discharge of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell from their debts, both individual and partnership, without further qualification, but as to Thompson it specifically seeks only release of liability from those "who shall assent hereto." There is no allegation anywhere in the complaint or anywhere else in the papers in this action, that the defendants herein assented to the composition. If they had, undoubtedly, they would have been bound. And, again, in paragraph Ninth of said offer, the following language is used:

> "Ninth: Each and every creditor of S. H. P. Pell & Co., WHO SHALL ASSENT TO THIS OFFER of composition shall, upon the final confirmation of such composition by the Court, be deemed conclusively BY HIS SAID ASSENT THERETO to have released Robert M. Thompson of and from any and all liability to such creditor on account of any connection of said Robert M. Thompson with S. H. P. Pell & Co., or any transaction of said Robert M. Thompson by or through S. H. P. Pell & Co."

This clearly indicates that the parties proposing the composition at that time were not will-

ing to risk asking the Court to enter an order which would be *ultra vires* and which might for that reason be afterwards declared void, so that they were careful to provide that any release which might be secured by Thompson in connection with the composition proceedings should only apply to those who specifically assented thereto. Thompson was claiming to be a creditor of the bankrupts' estate in over $3,000,000 (Complaint, fol. 29), and he was seeking to get his claim adjusted by having the receivers deliver to him securities of immense value which they held (Complaint, fols. 28, 162, 167, 208-218); and Thompson's acceptance of the composition offer was not made in consideration of any release by creditors, but in consideration of an order obtained authorizing the turning over to him of such securities (see acceptance of Thompson, Exhibit 7, of Complaint, fol. 259); and that order was thereafter, entered (Complaint, Exhibit 8, fol. 265).

The order confirming the composition (Complaint, Exhibit 9) provides:

> "It is Ordered, Adjudged and Decreed, that the said composition be and the same hereby is in all respects confirmed, and the said offer of composition dated December 21, 1914, with Exhibits 'A,' 'B,' 'C,' 'D' and 'E' annexed thereto, are hereby made a part of this decree."

The conditions contained in the offer are thereby carried into the decree.

It then goes on to provide for the appointment of the trustees and other administrative matters,

and the only reference made in the decree to Thompson is where it confirms the settlement of his claim and the transfer of the stocks and bonds to him (fol. 285), and then provides:

> "and upon the said Robert M. Thompson executing and delivering to the receivers a release of any and all claims which he may have against the bankrupts, against the receivers thereof, and the estates of S. H. P. Pell & Company and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, and in all respects complying with the terms of the offer of composition on his part to be performed, and thereupon the said Robert M. Thompson *shall be relieved of* any *further liability to the said receivers or to the estate* by reason of the order heretofore entered by this Court dated January 6, 1915, or otherwise" (italics ours).

It will be noted that any attempt to release said Thompson from liability to creditors was very carefully avoided.

It will also be noted that both in the offer of composition and in the order confirming the same, any reference to the question of whether Thompson was a general or special partner was carefully avoided. So that there was no adjudication of that question there.

As to (b).

We submit that a reading of the order shows that it does nothing more than confirm a composition offered by certain bankrupts, authorizes the

receivers to make settlement with one claiming to be a creditor (Thompson), and dismisses two intervening petitions by consent. It does not attempt to adjudicate the question of Thompson's partnership status.

We have seen that the order did not attempt by its provisions to discharge said Thompson from any liability to creditors. If it had, it would still be nothing more than a discharge in bankruptcy or an ordinary order confirming a composition, assuming that he had been one of the adjudicated bankrupts; and, that being so, the District Court would not attempt to interfere in an action brought on a debt which might be discharged by that order, as we have stated in Point I above, and which we understand is not seriously disputed. But the order cannot amount to even that as we have seen (*supra*, p. 14).

As to (*c*).

It is alleged in the complaint that the composition was

> "pursuant to the provisions of the Bankruptcy Act in such case made and provided" (fol. 30).

However, if the order had purported to be more than a discharge or an order confirming a composition, then it would have been clearly *ultra vires*; and it will not be so construed, but the Bankruptcy Court will be presumed to have been acting within its jurisdiction. The Court of Bankruptcy is a court of limited jurisdiction, COLLIER on Bankruptcy (11th Edition, page 27) says:

> "The origin of Courts of Bankruptcy is statutory, and they have no powers or jurisdic-

> tion other than is conferred upon them by, or necessarily implied from, the statute."

We submit that one will search vainly in the bankruptcy act for any provision authorizing any proceeding in the nature of a bill of peace or conferring upon a Bankruptcy Court power to enter such equity decrees.

In *Bardes vs. Hawarden,* 178 U. S., 524, the Court at p. 535, said:

> "The section nowhere mentions civil actions at law, or plenary suits in equity and no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of the incidental powers."

While a Bankruptcy Court has sufficient equity powers to enable it to properly administer the Bankruptcy Act, its powers are limited to the administration of that act, and it has no power to enter a decree barring claims except as that might be done by a discharge or an order confirming a composition, or as it may be done upon the foreclosure of liens in the course of the administration of the estate.

In re Frear, 120 Fed. R., 973, Judge RAY said (pp. 927-80):

> "The parties and referee have adopted a mode of composition and procedure utterly at variance with the law, and now ask the Court to approve and confirm it. The proceeding adopted and followed is not sanctioned by the law, and neither the Court nor the Judge has power to confirm it. * * * * * The statute was made to be observed and complied with, and

> only when there has been a substantial compliance therewith will the Judge or Court approve and confirm the proceedings;"

and further quotes with approval from the opinion of Judge COXE *in re* Rider, 90 Fed. R., 808, as follows:

> "A law which compels a creditor, against his will to accept in discharge of his debt just what the debtor sees fit to offer, should be strictly construed."

See also

In re Lockwood, 104 Fed. R., 794;
In re Northampton, etc., 185 Fed. R., 542;
In re Fairlamb, 199 Fed. R., 278.

A reference to the authorities shows that the only instances in which the District Court has assumed ancillary jurisdiction in connection with bankruptcy proceedings is where the question of title to property has been involved such as where liens have been claimed by receivers or trustees upon property and the Court has determined the question of title either by foreclosure or otherwise, and attempts were afterwards made in other courts to deprive the purchaser of such property of the same by seizing the same on claims against the bankrupt. A careful search of the cases has failed to reveal any other grounds upon which any United States District Court has taken jurisdiction ancillary to bankruptcy proceedings. We submit that it cannot be seriously contended that the action here sought to be enjoined is an attempt to seize property from one in whom the District Court has

vested title. On the contrary, the action in South Carolina is against the very members of the bankrupt firm and what is asked for there is a personal judgment against those individuals. If the bankruptcy proceedings are a bar to a recovery in that action, they have a perfectly adequate remedy at law by setting up the discharge in bankruptcy in answer to that action. The plaintiffs may say that said Thompson was claiming title to various securities which the receivers also claimed, and by an arrangement between said Thompson and the receivers which was confirmed by order of this Court, the title to those securities was vested in Thompson. But, even if we assume that all that is true, it does not avail the plaintiffs here, because even by the farthest stretch of the imagination the action sought to be enjoined cannot be converted into an attempt to seize property as to which the title has been vested in Thompson. It is alleged in the complaint in said action in South Carolina (Exhibit 11, to Complaint here), that said Thompson was a partner in said firm of S. H. P. Pell & Co.; and it is to recover against him as such partner as well as the other members of said firm that the action is brought (Exhibit 11, fols. 298-315).

The case of *In re Swofford*, 180 Fed., 549, is one of the leading cases on the question of jurisdiction ancillary to bankruptcy proceedings relied on by plaintiffs. But, that case is entirely different from the case at Bar. In the Swofford case a corporation was the bankrupt. It had a claim against Swofford which was passed to the trustee and was by him sold and transferred to Swofford. A stockholder afterwards brought a suit for accounting

against the corporation and Swofford with respect to the same claim. The Court said:

> "We have seen that a proceeding in bankruptcy is a proceeding in equity, and that for the purposes of enforcing and protecting its jurisdiction a Court of Bankruptcy has all the inherent powers of a Court of Equity. This being the case, it may be appealed to by supplementary and ancillary bill to enforce its orders, sustain its jurisdiction, and protect parties before it in the enjoyment of rights secured through and under it, and this is always true where jurisdiction is reserved or still retained, and even afterwards *where the result would be a relitigation of the same subject matter between the same parties.*" (Italics ours.)

We submit that there was no adjudication in the Pell bankruptcy proceeding of the subject matter involved in the South Carolina action or any other matter *between these parties.*

The defendants here were in no sense parties to any proceeding in the Pell bankruptcy matter, and cannot be bound by anything that transpired there except in so far as all creditors may be bound by the discharge.

Even if they had appeared and opposed the composition, nevertheless they could not now be enjoined from suing on their debt in another court, the remedy would be to set the discharge up in bar.

Friend vs. Talcott, 228 U. S., 27.

In the case of *In re Ohio Copper Co.*, 241 Fed. R., 711, Judge MAYER at page 713, said:

> "In respect of the Madison Company, a rather interesting question is presented. That Company, upon its own motion, has obtained an order allowing it to intervene in the bankruptcy proceeding. It has submitted itself to the jurisdiction of the bankruptcy court, and there it must stay so far as concerns any attack by it upon the orders of the bankruptcy court.
>
> * * * * * *
>
> "It is the long settled and salutary practice of a court of equity to protect purchasers at sales held pursuant to its decrees, and a court of equity will not permit a party to institute in other courts and jurisdictions litigations which attack the title of the purchaser.
>
> * * * * * *
>
> "A court of bankruptcy may therefore accomplish by its order a result similar to that which could be accomplished by a court of equity under similar circumstances, *provided, of course, the person against whom the decree or order is directed was a party to the proceeding and had been served in personam.*"

There is no allegation in the complaint that defendants were parties to any proceeding which is claimed now as *res adjudicata.*

Defendants would not have been heard to object to the confirmation of the composition as their debt was not dischargable.

In re Serviss, 140 Fed. R., 222.

And Judge MAYER in the Ohio Copper case further says at page 712:

> "In the case at bar it is highly inconsistent (to put the matter mildly) for the court to say to Heinze that he cannot intervene in the bankruptcy proceeding to attack such orders of the court as he may be advised, and a moment later say that the court has power to compel him to remain in the proceeding from which the court has just excluded him."

The substance of what was held in *Riverdale Mills vs. Mfg. Co.*, 198 U. S., 188, will be found at page 195, where the Court said:

> "It may protect the title which it has decreed as against every one a party to the questions of right which have already been determined."

There is no more ground for ancillary jurisdiction here than there was in the following cases:

> *Stillman vs. Combe*, 197 U. S., 436;
> *Cook vs. Beacher*, 217 U. S., 497;
> *Central Trust Co. vs. Chicago, etc., R. Co.*, 224 Fed. R., 706.

In Stillman vs. Combe, *supra*, at page 448, the Court said:

> "We are somewhat at a loss to add anything to a statement of the case to show how utterly without foundation is the claim of jurisdiction over the bill as an ancillary suit. The bill does not seek either to disturb the judgment or to have anything done towards carrying it out.

> The judgment was satisfied, and the functions of the court in the former case were at an end when the land was recovered. * * * It may be that the judgment would not have been the same but for the agreement of some of the parties upon those matters. But the bill does not allege that it was obtained by fraud, and, as we have said, does not seek to set it aside."

III.

The plaintiffs have an adequate remedy at law; and therefore the Court below was right in dismissing the complaint.

Giving the bankruptcy proceedings the most favorable construction possible to plaintiffs, the result is nothing more than a discharge of all the plaintiffs from debts due creditors of Pell & Co.

The debt sued on in the South Carolina action as is shown by the complaint, Exhibit 11 to the complaint herein, was not one that was dischargable in bankruptcy, and, therefore, nothing occurring in the bankruptcy proceedings could result in a discharge.

But, even if it were, that is a defence which will be accorded full faith and credit in the United States District Court for the Eastern District of South Carolina.

> "A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.'
>
> Bankruptcy Law, Sec. 21f.

An avoidance of a discharge is not a collateral attack upon the discharge.

Schiller vs. Weinstein, 15 Am. B. R., 184;
Remington on Bk., Sec. 2443.

Moreover, not only is the remedy complete and adequate, but it is the more orderly and efficient way of asserting the benefit of a discharge.

IV.

As to the contentions set up in petitioners' petition and brief.

We shall not attempt to reply to each of appellant's points separately. We have covered the principal questions in our previous points and shall therefore only briefly reply here.

The appellant's brief contains citations to and quotations from a great mass of decisions which are mostly so obviously irrelevant that we shall not impose upon the Court's time by attempting to take them up one by one and distinguish them.

As to the Petition.

The petition (top of page 12) states that the "decree of dismissal was modified so as to provide that the bill was dismissed for want of jurisdiction" we submit that this is not correct as a reference to the decision of the Circuit Court of Appeals shows (fol. 437) that the only modification directed is "to provide that the dismissal is without prejudice".

Under subdivision "II" (page 12) the petition states "that it was held that the Court was without jurisdiction" and goes on to say that "the bill should have been retained and a trial of the issues of fact * * * proceeded with".

And, under "III" (page 13) the petition assigns as a reason of gravity for review:

> "That it has now been determined in this cause by the Circuit Court of Appeals for the Second Circuit that the District Courts of the United States are without ancillary jurisdiction to protect the persons with whom * * * contracts are made under the direction of the Court * * * between receivers and creditors * * * and * * * persons claiming to be creditors * * * ; and that such courts are without power to entertain a bill to protect parties to such settlements, or to consider the merits of such bill."

We are unable to understand this statement in view of the opinion of the Circuit Court of Appeals in which that Court states (fol. 424):

> "We do not question but that the District Court for the Southern District of New York may enforce and protect its jurisdiction, as a Court of Bankruptcy when appealed to by a supplementary or ancillary bill to enforce its orders, sustain its jurisdiction and protect parties in the enjoyment of rights secured to them under its orders. This is so not only where jurisdiction is reserved or still retained but even afterwards where the result would be a relitigation of the same subject matter between the same parties."

The Court then goes on to consider the merits and holds in substance that the facts of this case do not warrant the exercise of any ancillary jurisdiction. It says:

> "The Court below found in the bill no ground for equitable intervention even if all the allegations of the bill contains be assumed as true. We are in full agreement with that court in believing that the bill is without equity."

That certainly sounds like a decision on the merits; and if, when all the allegations of the bill are assumed to be true, there is still no equity, what possible purpose could be served by having "a trial of the issues * * * proceeded with", except the purpose of delay which is apparently the whole purpose of the suit.

Petitioners' Brief.

Replying to the point designated "Introductory" the difficulty with petitioners' argument is, that it does not appreciate the difference between a claim by the *firm* against Thompson as a *debtor* and a claim by a *creditor* against him as a *partner*, and that is the difficulty with their argument in the subsequent points.

We submit there is a great deal of difference and while a claim of the *firm* or *estate* against a *debtor* may be compromised and released, the liability of a *partner* could only be released or discharged in accordance with the provisions of the bankruptcy act.

Petitioners seem to think that there is some merit in the point that the demurrer admits the allegation that Thompson is a special parner. We cannot grasp this point of view. First, we believe that the allegation referred to is a conclusion which would not be admitted by the demurrer. But, suppose it is admitted for the purposes of the demurrer, how can that avail these petitioners? Certainly, such an admission does not give any ground for an injunction. It is what happened in the bankruptcy proceedings that petitioners are trying to found jurisdiction on. Petitioners say in their brief (page 22) referring to Thompson "he was not adjudicated a bankrupt, but as a part of the settlement, the petitions to have him so adjudicated, were dismissed." Can it be possible that when one is alleged to be a bankrupt and such petitions are dismissed on consent, that such a dismissal can be a bar to creditors. Certainly the bankrupt act does not provide any such method for obtaining a discharge.

Petitioners seem to think that the law of New York relating to special partners has something to do with this proceeding; and were we to go into it at length, we would be equally guilty of taking up the Court's time with an irrelevant discussion, but we do desire to say in passing that the petitioners' argument is apparently based on an unfamiliarity with the law of New York on that subject, because even a casual examination will reveal that any liability existing against a special partner is in favor of creditors, and not the firm, that when a special partner pays in his contribution to the capital, there is no further liability to the firm, but

that he may incur a liability to creditors the same as if he was a general partner (Partnership Law, Section 34).

Petitioners lay great stress on the settlement made by Thompson with the receivers. An examination of the order on this settlement (fol. 265) will show that it was simply to enable Thompson to regain possession of securities of immense value, upon his assuming the liens against the same; and it did not attempt to pass on the relation of Thompson to creditor.

Petitioners' brief (page 25) says:

> "That the error of the Circuit Court of Appeals was in not recognizing that the proceedings in the cause discharged Thompson * * * of all liability to the firm and any one claiming under it."

But the defendants are not setting up any liability of Thompson to the firm and are not claiming under the firm. Their claim is against the firm and the individual partners.

After quoting from the opinion of the Court of Appeals, which discusses the condition that any release to Thompson should only be to such creditors who should assent to the offer of composition, the petitioners' brief (page 27) states:

> "The fallacy of this language of the opinion lies in its appeal to the offer of composition to limit the terms of the decree * * *; the terms of the composition cannot possibly limit the express language of the decree."

We do not believe plaintiffs' counsel intend to mislead the Court, but clearly they have not read the order they rely on, for it specifically says:

> "It is Ordered, Adjudged and Decreed that the said composition be and the same hereby is in all respects confirmed *and the said offer of composition* dated December 21, 1914 with Exhibits A, B, C, D and E annexed thereto are *hereby made a part of this decree.*" (Italics ours.)

AS TO PETITIONERS' POINT I.

The contention as to admissions by the demurrer we have already replied to. The case of *U. S. vs. Cal. & Or. Co.*, 192 U. S., 355 is cited with great confidence to sustain the contention that the dismissal of the intervening petitions against Thompson was a litigation of the partnership question. But, in that case it appears, at p. 356, as to the former action:

> "On March 29th, 1913, a final decree was entered, finding the facts to be as alleged by the Land Company, including the allegation that the Land Company was a *bona fide* purchaser for value, and dismissing the bill on that ground."

That would seem to have been a dismissal on the merits, whereas, the dismissal here was nothing more than a voluntary non-suit, besides the defendants here were not parties to that proceeding, so that there can be no question of a relitigation of any question between these parties.

AS TO PETITIONERS' CONTENTION OF A "CONTRACT OF THE COURT."

The order of January 6, 1915, was simply one permitting the receivers to dispose of certain securities held by them; and the decree of January 25, 1915, as we have seen, did not and could not go further than the offer upon which it was based. Therefore there is no "contract of the Court" which is being attacked here.

In the case of *Abendroth vs. Van Dolsen*, 131 U. S., 66, which was a case quite similar in facts to this, the Supreme Court, Mr. Justice LAMAR writing, said, at p. 70 (referring to special partner's liability as a general partner):

> "The counsel for plaintiff in error * * * contends that the plaintiffs are estopped from setting up this liability by the proceedings in bankruptcy above recited, which he claims had the effect of an adjudication binding upon them that no such liability existed."

and at p. 72:

> "But even if, for the sake of argument, we concede that this last order of the Judge was in effect an adjudication that Abendroth was a special partner, there is nothing in the judgment of the Court below which denies its validity. The latter judgment also holds Abendroth to be a special partner, and as such liable, under the statute, in the same manner that he would be if he were a general partner."

See also

> Quotation from Friend vs. Talcott on p. 12 hereof.

Petitioners cite the case of *Abbott vs. Anderson,* 265 Ill., 285. We are unable to see that that case has any bearing on the question here. There a number of suits had been brought involving the same question, by persons who had been parties to the composition proceedings, and all the members of the bankrupt firm had offered the composition, which presumably was accepted by those creditors, as they withdrew objections previously made.

But, if it could be construed to be authority for petitioners' contentions, then we say it is contrary to the decision of this Court in *Abendroth vs. Van Dolsen, supra.*

As to the contention that the defendants are bound by the decree of January 25th and that for purposes of the present bill the proceeding in the bankruptcy must be treated as valid, we submit that no contrary contention has been made by the defendants.

As to Petitioners' Point II.

Petitioners' Point II is in substance that the order of Jan. 25, 1915, confirming the composition finally discharged and released Thompson from claims of all creditors of Pell & Co. As we have seen, even if this were so it would not entitle appellants to an injunction, the remedy would be to set up the discharge as a plea in bar. But such a construction of the effect of the confirmation of the composition is contrary to the express language of the offer of composition which provided (para-

graphs "first and ninth") that any release of said Thompson should only be as to creditors

> "who shall assent hereto" (fol. 154).
> "who shall assent to this offer" (fol. 161).

and, certainly the order confirming the composition did not pretend to change the terms of the composition as submitted to and accepted by the creditors. On the contrary, it specially makes the offer a part of the decree. The offer (par. "ninth") further provided that such assenting creditor should upon the final confirmation of such composition be deemed

> "by his said assent to have released Robert M. Thompson."

It will be noted that no such provision is made with respect to the release of the three bankrupts, and that no claim is made that defendants ever assented to said offer.

The offer containing these provisions was accepted by Thompson, so that he might regain possession of valuable securities which the receivers held (fol. 260).

Petitioners seem to attach importance to the use of the word "assent" instead of "accept" in the offer of composition. While some may find a technical distinction between the two words, in every day usage the words are used as synonyms and are stated to be such in the Century Dictionary, so that we are inclined to believe that the word "assent" was used in said offer in its ordinary meaning of "accept," "consent," "agree." If it were used with intent of expressing more than "accept" then, we say that it shows all the more clearly that no

attempt was made to release Thompson as to all his creditors; because "assent" technically defined is intended to convey action of the mind in agreement or approval, and is evidenced by acceptance.

> "An assent is evidenced by a proposition emanating from one side and acceptance of it on the other."
>
> *Fulton vs. Kemp,* 16 N. Y. S., 158, 160.

See also,

> *Lemp Brewing Co. vs. Secor,* 96 Pac. R., 636, 639.
> *Webster vs. Brassfield,* 67 Mo., 331.
> *Norton vs. Davis,* 83 Tex., 32.

To constitute an "assent" the proposition must be fully known to and understood by the party assenting.

> *Words & Phrases,* Vol. I, pp. 545-6.

There, therefore, could not be an assent to the release of a claim which was not known to exist, certainly not without some definite affirmative act.

To construe this word as petitioners seek to do would be to change the language to read "who shall not object hereto."

We do not understand the statement at the end of Petitioners' Point II that "it is not alleged that Thompson had personal knowledge of the alleged fraud." The allegation is (fol. 308):

> "And that defendants at all times knew that said alleged purchases and sales had not been made and that the said notices, statements, reports, representations and statements of account made and rendered by defendants to

plaintiffs as aforesaid were false and fraudulent at the times they were severally made."

Thompson is one of the defendants referred to in said allegation (fol. 299).

As to Petitioners' Point III.

This point is in substance a restatement of contentions made in the previous points which we have already replied to.

This point shows the utter confusion in the minds of petitioners and their inability to grasp the true situation here: viz., that the action in South Carolina is not an attempt to enforce any liability of Thompson as a debtor to the firm or estate of Pell & Co., but an individual liability, asserted against him and the other members of said firm as partners. If this debt sued on was a dischargable debt then the discharge in bankruptcy undoubtedly will be a bar as to any or all of the partners discharged.

For an illustration suppose, as in the Swofford case, so much relied upon by appellants, a corporation becomes bankrupt and a question arises as to the liability of one of its officers as a debtor to the estate. Upon that liability being compromised and settled by order of the Court no one can afterwards sue that officer-debtor on that debt in behalf of the corporation or its bankrupt estate; but suppose a creditor were to sue that officer-debtor not as an officer of the corporation, and not on his alleged debt to the corporation, but as an individual, claiming that there had never been any corporation but that the business was in reality a partnership,

and that the officer was a partner and liable as such to the suing creditor for the full amount of the creditor's claim, would that partner, because he had in the guise of debtor paid certain money in settlement of an alleged debt, into the estate, be permitted to escape his general liability as a partner by setting up his release as a debtor?

Here Thompson made a settlement of his claim as a creditor and received securities of great value. There is no attempt now to litigate any liability of Thompson as a debtor to Pell & Co.

Moreover, no question has ever been litigated between Thompson and these defendants, therefore there can be no relitigation.

It is said on page 50 that McCabe's firm "induced Thompson's action by posing as a debtor". It is difficult to see how one who has been defrauded and does not know of the fraud (fol. 306) and who has been falsely scheduled as a debtor, can be said to be "posing" as a debtor.

There is no foundation for the contention that proceedings in this matter are in the nature of a bill of peace; and no attack is made in the South Carolina action upon any title established in the Bankruptcy Court.

The error in the plaintiffs' argument is that it assumes that the District Court for the Eastern District of South Carolina will not give full faith and credit to any discharge or decree that may have been granted by the District Court for the Southern District of New York, whereas, we must assume that the South Carolina Court will comply with the provisions of the Bankruptcy Act quoted *supra* (p. 27).

Reduced to a final conclusion, appellants' argument is that as a result of the bankruptcy proceeding, Thompson as well as the other partners, was discharged. If we assume for the purpose of this argument that this is so, then, since the South Carolina Court is required by the statute to give such decree full faith and credit, the plaintiffs have a perfectly adequate remedy at law and should avail themselves of it by setting up the discharge in the Court where the action on the debt is pending.

The avoidance of a discharge in bankruptcy is not a collateral attack upon the discharge (*supra*, p. 28).

AS TO PETITIONERS' POINT IV.

In the case referred to there, namely, *Brown vs. Alton Water Co.*, 222 U. S., 313, this Court simply states that there is always a method whereby this Court may review a case which should be reviewed.

V.

It is respectfully submitted that the application should be denied.

WILLIAM ST. JOHN TOZER,
Attorney for Respondents.

HENRY BUIST,
WILLIAM ST. JOHN TOZER,
GEORGE L. BUIST,
of Counsel.

Office Supreme Court, U. S.
FILED
MAY 17 1919
JAMES D. [illegible],
Clerk.

No. 88[illegible]31

Supreme Court of the United States

STEPHEN H. P. PELL, Charles A. Kittle, Howland H. Pell and Robert M. Thompson,

Plaintiffs-Petitioners,

against

W. GORDON MCCABE, Jr., and William F. Gray,

Defendants-Respondents.

MOTION TO ADVANCE

WILLIAM ST. JOHN TOZER,
Counsel for Defendants-Respondents,
No. 42 Broadway,
New York City,
New York.

Supreme Court of the United States

STEPHEN H. PELL, Charles A. Kittle, Howland H. Pell and Robert M. Thompson,
Plaintiffs-Petitioners,

against

W. GORDON MCCABE, Jr., and William F. Gray,
Defendants-Respondents.

MOTION TO ADVANCE.

Now come W. Gordon McCabe and William F. Gray the defendants-respondents, in the above entitled cause, by William St. John Tozer, their counsel, and respectfully move this honorable Court that the said cause be advanced for hearing and set down for hearing on such date as the Court may deem best.

The said defendants-respondents, pursuant to the rule of this Court, make the following statement of the matter involved, and of the reasons for this application.

Statement of the Matter Involved.

The above entitled cause is a suit in equity brought by the plaintiffs-petitioners, in the United States District Court for the Southern District of New York, for the purpose of perpetually enjoining these defendants-respondents, from further proceeding in or continuing an action now pending in the United States District Court for the Eastern District of South Carolina, on the ground that an order confirming a composition in bankruptcy previously made by the United States District Court for the Southern District of New York in an involuntary proceeding in bankruptcy against three of the plaintiffs-petitioners, Stephen H. P. Pell, Charles A. Kittle and Howard H. Pell, released and discharged plaintiffs-petitioners, from all liability to defendants-respondents, and that said order of composition adjudicated and disposed of the issues involved in the action in South Carolina, to such an extent that defendants-respondents should be enjoined from continuing said action. The amount involved in said action in South Carolina is $1,500,000.

Neither the plaintiffs nor the defendants in said equity suit are residents of the Southern District of New York, so that the only ground for the issuance of an injunction by that Court is on the theory set up by plaintiffs-petitioners, that said suit is ancillary to the bankruptcy proceeding heretofore had in said Court, for the purpose of enforcing the decree of that Court confirming the composition in said bankruptcy proceeding.

The only question involved in this action is whether the order entered by the District Court in the Southern District of New York, in the bankruptcy proceeding, is such a discharge and such an adjudication of the issues involved in the action in South Carolina as to warrant said Court in exercising ancillary jurisdiction to enjoin the continuance of said action in South Carolina.

Reasons for the Application.

The above entitled case is a suit for injunction. The District Court for the Southern District of New York, in which such suit was instituted, sustained a demurrer to the bill of complaint and dismissed the suit. The Circuit Court of Appeals, on appeal, unanimously affirmed such judgment of dismissal. This Honorable Court has granted a writ of certiorari to review the action of said Circuit Court of Appeals; and pending the determination of this Court, a temporary injunction has been granted or continued, restraining defendants-respondents, from proceeding in said action in South Carolina until the decision of this Court upon said review.

That the cause of action upon which the action in South Carolina is pending arose in the year 1913, but was concealed from the defendants-respondents, by plaintiffs-petitioners' fraud, and was not discovered by them until several years later and were thus delayed in bringing their action; that the amount involved is large and that if defendants-respondents are prevented from proceeding at once

in said cause they may suffer irreparable damage by reason of the loss of evidence, the death of witnesses, or the insolvency of the defendants, besides being kept out of their money by further delay.

The questions to be determined by this Court are not many and should not require an extended argument. Questions similar to those involved in this case have already been passed upon by this Court in the case of Gratoit County Bank vs. Johnson, decided by this Court on March 17, 1919 (Advance Sheets, L.r. Ed., Apr. 15, 1919, No. 11, p. 317), which case will undoubtedly be to some extent controlling in the decision of this case.

It is further submitted that the question as to whether injunctions should be issued by District Courts to restrain actions on causes of action claimed to be barred by discharges in bankruptcy, is one of great importance.

For the foregoing reasons and considerations the granting of the motion to advance is respectfully requested by the defendants-respondents.

Respectfully submitted,

WILLIAM ST. JOHN TOZER,
Counsel for the Defendants-Respondents.

Notice of Motion to Advance.

Sir:

Please take notice that the defendants-respondents will submit the foregoing motion to advance to the Supreme Court of the United States at a stated term thereof on Monday, May 19, 1919, at the Capitol, in the City of Washington, D. C., at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

Yours respectfully,

WILLIAM ST. JOHN TOZER,
Counsel for Defendants-Respondents,
No. 42 Broadway,
New York City,
New York.

To MYERS & GOLDSMITH, Esqs.,
Attorneys for the Plaintiffs-
Petitioners.

Supreme Court of the United States

STEPHEN H. P. PELL *et al.*, Plaintiffs-Petitioners, against W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants-Respondents.	October Term, 1918. No. 889. Writ of Certiorari.
STEPHEN H. P. PELL *et al.*, Plaintiffs-Appellants, against W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants-Appellees.	October Term, 1918. No. 945. Appeal from Decree.

IN ANSWER TO MOTION TO ADVANCE.

And now come Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson, petitioners in the above-entitled cause No. 889, wherein a writ of certiorari was granted by this Honorable Court on the 17th day of March, 1919, and appellants in the above-entitled cause No. 945, on an appeal from the decree in the above-entitled cause, and by Lindley M. Garrison, Counsel, answer-

ing the motion to advance the cause for hearing, respectfully state, in correction of the statement of facts set forth by the moving parties to advance the cause:

The Nature of the Controversy.

On September 13, 1918, in the District Court of the United States for the Southern District of New York, your petitioners, as plaintiffs, filed their said bill of complaint invoking the exercise of ancillary jurisdiction against the defendants, wherein they allege in substance that the defendants, in disregard of a settlement of a controversy between Robert M. Thompson and the Receivers in Bankruptcy of the firm of S. H. P. Pell & Company, made and approved by the United States District Court for the Southern District of New York, in bankruptcy proceedings then and theretofore pending before it, and in disregard of the order or decree settling said controversy, and of a compromise agreement and decree confirming the same, had instituted and were carrying on a suit against the plaintiffs in a Court of South Carolina, whereby the defendants sought to relitigate a matter already determined in the Bankruptcy Court, and to assert a liability against the plaintiffs which had been fully determined, compromised and released in the bankruptcy proceedings.

The learned District Court, holding that the said bill was without equity, dismissed the suit upon the merits, and the learned Circuit Court of Appeals for the Second Circuit, in affirming the judgment, held in its mandate that the District Court was without jurisdiction, and in its opinion discussed the merits of the bill.

A complete and detailed statement of the facts, as well as of the questions involved, is more particularly set forth in our petition to this Honorable Court for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit, and which was granted on the 17th day of March, 1919 (No. 889, October Term, 1918).

We respectfully refer to that petition and the argument printed therewith, instead of reiteration, in correction of the statement of the movants.

The question of the jurisdiction of the District Court is not the only question involved in the action; there are additional questions, to wit, whether the plaintiffs' bill of complaint is meritorious and its prayer should be granted, or whether it should be dismissed for want of equity; and this additional question was discussed at length in the opinion of the Judge in the District Court and in the opinion of the Circuit Court of Appeals, both of which appear in the record which is annexed as an exhibit to the petition for the writ of certiorari, to which record reference is hereby made (the Clerk of this Court not yet having printed the record for use in this Court).

The reasons given for the application to advance should not prevail, not only because this is not a case which meets the requirements of Rule 32 of this Court in that jurisdiction is not the sole question in issue, as above shown, and further because it is not a case where there is any certificate that jurisdiction is the sole question in issue, but further because the reasons specifically assigned in the motion are not sound and should not prevail, in that the demurrer referred to in the motion, upon which the

bill was dismissed, was not confined to the question of jurisdiction, but specifically urged (p. 115 of the original record, filed with the petition for the writ of certiorari) that it appears on the face of the complaint that no cause of action exists in favor of these plaintiffs for the relief prayed for or for any relief from this Court (p. 11 of the printed petition for the writ of certiorari).

The allegations of fraud set forth in the motion to advance are in nowise admitted by the plaintiffs-petitioners, but, on the contrary, at a proper time and place will be the subject of issue, and for the purposes of this motion are expressly hereby controverted, and further because the said grounds presuppose the right of the moving parties to succeed upon the issues which they have tendered in the South Carolina action, which should not be assumed for the purposes of the motion to advance, especially as these assumptions are based upon allegations of merit and not of want of jurisdiction.

The questions to be determined by this Court are not confined to the issue of jurisdiction (*Re Tampa S. R. Company*, 168 U. S., 583; *Chappell* v. *United States*, 160 U. S., 499; *Siler* v. *L. & N. R. Co.*, 213 U. S., 175; *Wilson* v. *United States*, 232 U. S., 563; *Williamson* v. *United States*, 207 U. S., 425), for this Court may consider all question raised by the demurrer either upon the writ of certiorari or upon the pending appeal in the same cause hereinafter more fully referred to.

And these petitioners deny that the case of *Gratiot Bank* v. *Johnson* mentioned in the motion to advance, appears dispositive of the questions to be raised in this cause. Furthermore, the question of the propriety of the issue of an injunction, suggested in the motion to advance, though un-

doubtedly of great importance, is not an issue of the ancillary jurisdiction of courts in bankruptcy.

We respectfully submit that a proper case is presented to this honorable Court to examine, consider and pass upon all the questions involved and not to limit or confine the consideration and decision to the question stated by the moving parties.

Counsel for the Petitioners respectfully urges that the importance of the question justify the oral argument of the questions involved.

In view of doubt entertained by counsel as to whether the controversy should be presented to this Honorable Court by writ of certiorari or by appeal from the decree, an appeal from the decree was duly allowed in the Court below and a transcript of record duly filed in this Court (Nos. 889 and 945, October Term, 1918).

It is respectfully submitted and urged by counsel in opposition to the granting of this motion that the advancement of the cause for an early date, viz.: in June, would expose counsel, who have been retained to argue the cause in this Court, to great inconvenience and possible hardship, in view of his present actual engagements in Court and engagements made for the month of June, 1919, which is the last term of the State Courts before the summer vacation.

The Clerk's fees for the transcripts of record in both cases, Nos. 889 and 945, for the printing have been advanced and paid, but the printed transcripts of Record upon the Writ of Certiorari and on the appeal from the Decree have not been received and are not available for use in preparing the Briefs and Argument in this Honorable Court.

Counsel for the petitioners-appellants take advantage of this opportunity to request this Honorable Court to order that the hearing upon the writ of certiorari and the appeal from the decree be consolidated and heard together.

For the foregoing reasons it is respectfully submitted that the motion to advance be denied, and the request granted that the hearing upon the writ of certiorari and the decree be ordered to be heard at the same time.

Respectfully submitted,

LINDLEY M. GARRISON,
Counsel for Plaintiffs-Petitioners and
Plaintiffs-Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 311.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON,
Petitioners,

versus

W. GORDON MCCABE, JR., and WILLIAM F. GRAY.

UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

Statement of the Case.

The petitioners seek to review a decision of the Circuit Court of Appeals for the Second Circuit (Transcript of Record, printed page 77*) which

*All references are to printed pages of the Transcript of Record, and all italics, unless otherwise noted, are our own.

modified a decree of the United States District Court for the Southern District of New York by dismissing without prejudice and for want of jurisdiction the bill of the petitioners.

The jurisdiction of the said District Court was invoked upon the ground that by reason of certain prior proceedings in bankruptcy in the same Court, it possessed ancillary jurisdiction to protect the plaintiffs in certain rights under the decree of that Court which they, and especially the plaintiff Thompson, had acquired therein, and in protection of said rights, so acquired, to enjoin a suit in a State Court of South Carolina, prosecuted in disregard of such rights secured by such decree.

The decree of the District Court so modified (Transcript, pp. 63, 64) had dismissed (but *not* without prejudice) the bill upon a motion for judgment on the pleadings upon grounds of demurrer to the bill contained in the answer (p. 62).

I.

PRIMARILY, this review presents the question:

> Whether a United States District Court has ancillary jurisdiction, sitting as a court of equity, and without reference to the citizenship of the parties, to protect from further attack in a State Court, by creditors of a bankrupt firm, a person who has, with the approval of the District Court, in bankruptcy proceedings, in good faith, entered into a contract with the receivers in bankruptcy, settling a dispute respecting his relations with a bankrupt firm and his obligations to it and through it to its creditors, and who, in settlement of such dispute and pursuant to such contract, ratified by

> order of the District Court, has procured from the Court, in an order confirming the compromise and a composition with the bankrupt firm and in express terms releasing him from all liability to the bankrupts' estate because it was "for the best interests of the estate and the creditors thereof."

The Circuit Court of Appeals, while admitting the general principle of the existence of the ancillary jurisdiction in the District Court, denied the existence of such jurisdiction over this suit, because it considered that it is not in any proper sense an ancillary suit (Record, pp. 74, 75).

The Trial Judge said "that the bankruptcy court having jurisdiction to release Thompson of his debts undertook to do so" (Opinion, p. 67), but denied jurisdiction of the District Court to entertain the cause and further upon the demurrer to the bill set up in the answer (p. 62), held that the bill was without equity (p. 68).

Of course, if the Court was without jurisdiction, the question of equity was immaterial; and the Court of Appeals, taking this view, modified the decree of dismissal entered below (pp. 63, 64) by dismissing the bill without prejudice (pp. 76, 77).

At an earlier stage of the suit, on a special appearance to contest the jurisdiction, Hough, *C. J.*, concluded (p. 68) that

> "as an endeavor to restrain a defendant who was party or privy to a decree in bankruptcy there is jurisdiction to entertain suit."

He accordingly (pp. 68, 69) continued an injunction against the prosecution of the suit in the State Court, and set the cause for trial, with leave to

appear and answer, or make such motion as might be equivalent to a demurrer, saving defendants' rights to the jurisdictional question.

We have thus a contrariety of judicial views in the cause as to whether the jurisdiction invoked exists.

II.

While this question of jurisdiction is, therefore, the primary question, we assume that a SECONDARY QUESTION will also necessarily arise, namely:

Whether the plaintiffs are without equity.

As "on certiorari the whole cause is before the Court" (*Deck* v. *R. R. Co.*, 220 U. S., 580, 588-589), for, we assume, it would be immaterial whether the jurisdiction exists or not if it were apparent that no equity is presented for its exercise. And it was really this question which was presented by the demurrer in the answer (p. 62), though coupled with the denial of the jurisdiction, which had already been determined by Hough, *C. J.*, to exist.

The question of equity, so presented, is not really a question of meritorious defense to the action in the State Court, but whether the plaintiffs, in the present suit, show sufficient reason why they should stay the further prosecution of the State Court action, by application to the District Court to protect them, or whether they must be remitted to the State Court, to make their defense there. In short, the question is not merely whether the present plaintiffs have a meritorious defense to the State Court action, but whether they have an equitable reason why they should not be compelled to litigate the question in the State Court.

Upon these propositions, the present petitioners maintain:

1. The District Court had ancillary jurisdiction of the suit and should have exercised it (*infra,* pp. 17-21, 30-31, 51 *et seq.*).

2. The bill showed adequate ground for equitable interference and for the relief prayed or some other adequate relief (*infra,* pp. 13-17, 21-29, 32-50).

III.

The following is a CONCISE ABSTRACT OR STATEMENT OF THE CASE:

On September 13, 1918, in the District Court of the United States for the Southern District of New York, the petitioners, as plaintiffs, filed their bill (p. 3), alleging in substance that the defendants, in disregard of a settlement of a controversy between Robert M. Thompson and the Receivers in bankruptcy of the firm of S. H. P. Pell & Company, approved by the United States District Court for the Southern District of New York, in bankruptcy proceedings then pending before it, and in disregard of the order settling said controversy and of a compromise agreement and decree confirming the same, had instituted and were carrying on a suit against the plaintiffs in a court of South Carolina, whereby the defendants sought to relitigate a matter already determined in the Bankruptcy Court, and to assert a liability against the plaintiffs which had been fully determined, compromised and released in the bankruptcy proceedings.

The bill and its exhibits showed a complete documentary history of the proceedings in bankruptcy (Exhibits 1 to 9, pp. 15-53) and of the South Carolina suit which it sought to enjoin (Exhibits 10, 11, pp. 53-57).

The bill and the demurrer thereto in the answer (p. 62) squarely presented the question of law passed upon by the Courts below.

The bill averred that in the bankruptcy proceedings a controversy arose as to whether Robert M. Thompson, one of the present petitioners, was a general partner in the bankrupt firm (Exhibits 1, 2, pp. 15-24), and on that ground it was sought to have him adjudged an involuntary bankrupt (pp. 17-22), though he was never so adjudicated. Thompson claimed under the laws of the State of New York to be a special and not a general partner of the bankrupt firm; and the controversy was compromised by an agreement between Thompson and the Receivers (pp. 45-48), ratified by the Court by order entered January 6, 1915 (Exhibit 8, pp. 48-49); thereafter a composition offer was made by the bankrupts Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, three of the present petitioners, and a decree of confirmation of the compromise and the composition was entered (Exhibit 9, pp. 49-53).

The decree confirming the compromise and composition contained the following:

> "Ordered, Adjudged and Decreed that *it is for the best interests of the estate and of the creditors thereof* that the settlement with Robert M. Thompson set forth in said offer of composition and the transfer of the property to him referred to in said offer, shall be made, * * * *and thereupon the said Robert M. Thompson shall be relieved of*

> *any further liability to the said receivers or to the estate* by reason of the order heretofore entered by this Court dated January 6, 1915, or *otherwise* * * *" (Record, p. 51).

The bill showed (p. 11) that the defendants, in disregard of this release of liability, had instituted an action in Charleston, South Carolina, in the Court of Common Pleas, in which they demanded judgment for $1,500,000 damages and costs against Thompson and the members of the said firm for alleged acts of the firm, alleging that Thompson was one of its co-partners (Complaint in South Carolina, Exhibit 11, p. 54).

The plaintiffs sought (p. 13) perpetually to enjoin and restrain the defendants from taking any further steps or proceedings in their South Carolina action, which shall proceed on the ground that Thompson is liable as a general partner of the firm of S. H. P. Pell & Co., in respect to any claim which was provable in the bankruptcy proceedings, and perpetually to enjoin the defendants from maintaining and continuing the said action in the Court of Common Pleas for the State of South Carolina, and from instituting any other action founded upon the transactions set forth in the complaint therein; and to perpetually enjoin the defendants from attacking the power and jurisdiction of the District Court of the United States for the Southern District of New York in bankruptcy to make and enter the orders and decree under which, by said bill, the plaintiffs contended that rights had been secured to them, and especially to Thompson; and for an interlocutory injunction and other proper relief.

In view of the legal effect of a demurrer, we direct attention to additional averments in the bill.

The bill alleged (p. 3) that the firm of S. H. P.

Pell & Co. was a *limited partnership* formed and organized under the laws of the State of New York, and that Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell were general partners, and Robert M. Thompson was the special or limited partner.

The bill further alleged (p. 11) that the suit in South Carolina was brought with the intention of attacking the power and jurisdiction of the United States District Court for the Southern District of New York to make and enter the order of confirmation of the compromise and the order affirming the contract between the receivers and the petitioner Thompson settling the controversy as to whether or not Thompson was a general partner of the bankrupt firm and releasing him from all liability, and with the malicious intention and design of vexing and harassing the plaintiffs, and that its purpose was to needlessly and uselessly vex, annoy and harass them and subject them to great and unnecessary expense in attending and defending the action in South Carolina, remote and distant from their several places of occupation and residence and the place of residence and occupation of the necessary witnesses; and that it depended upon the same state of facts which were either brought out or could have been proven in the bankruptcy proceedings, and that any and all questions of fact and law which could have been raised and urged in said South Carolina action could have been raised, urged and maintained in the bankruptcy proceedings (pp. 11, 12); and that the real and actual purpose and design of the action in South Carolina was to assail and attack the validity and sufficiency of the proceedings, orders and decrees in bankruptcy, and the power and jurisdiction of the Court in those proceedings.

The bill further alleged that the receivers in bankruptcy gave notice to the defendants that the firm was in bankruptcy and of their appointment as receivers, and that the receivers demanded the payment of a claim due from the defendants to the bankrupt estate amounting to $261.52, and another claim of $91,467.57, and that defendants paid the said sum of $261.52 to the receivers and disputed their liability for the said amount of $91,467.57, and litigated the same thereafter in a suit instituted by the trustee of the said firm assets, who was appointed pursuant to the said composition, but interposed as a defense as upon contract and in such manner as to constitute it a provable claim in bankruptcy against said firm, the identical claim which they were now attempting to set up as a claim founded upon tort in the said South Carolina action.

The bill further alleged that the terms of the said composition and order of confirmation were fully carried out by the plaintiffs and each of them (p. 8), and alleged that by virtue of said proceedings,

> "the said bankrupts and the said Robert M. Thompson were released and discharged from all liability for the debts of and all provable claims against the firm of S. H. P. Pell & Co., and the creditors of said S. H. P. Pell & Co. were forever barred by the provisions of the offer of composition (Exhibit 6) and the order of confirmation aforesaid (Exhibit 9) and of the bankruptcy act aforesaid, and the said firm of S. H. P. Pell & Co. and the said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, general partners thereof, and Robert M. Thompson as special partner aforesaid, or otherwise, were as partners and individually released and discharged from any further liability to the creditors of the said firm, including the defendants * * *" (p. 8).

The bill showed that Thompson (who alone was served with process in the South Carolina cause) had entered a special appearance therein and had objected to the jurisdiction, and had the cause removed into the United States District Court for the Eastern District of South Carolina (p. 12), and that the action pending in South Carolina exposed the defendants to judgment of a court other than the court which rendered the orders, judgment and decree upon which the plaintiffs rely, and would expose and subject them to a liability from which they had already been released and discharged by the decree of the said court in bankruptcy (pp. 12, 13).

The bill also alleged (p. 12) that there were other persons who had threatened and intended to bring similar vexatious and harassing suits upon similar grounds in the courts of distant states, and that though it was impossible and impracticable to make all of the creditors of the firm parties, plaintiffs offered to make and admit as additional parties all persons claiming to be creditors of the said firm who might desire to come into the suit and be heard (p. 13).

The bill alleged that the plaintiffs had no adequate remedy at law, and could have no adequate relief except in the District Court for the Southern District of New York.

The defendants herein appeared specially in this present suit by attorney (p. 57) for the sole purpose of objecting to the jurisdiction of the court. But subsequently, Hon. Charles M. Hough, Circuit Judge (Opinion, p. 68), having expressed the opinion that there was jurisdiction to entertain the suit, as an endeavor to restrain a defendant who was party or privy to a decree in bankruptcy, and having expressed it as his view that the question of the power of the court

to make the decree in bankruptcy and that its proper construction was a question which could not be raised under a special appearance, but which entitled the plaintiffs at all events to a full trial, continued an injunction and set the cause down for trial (pp. 68, 69).

Thereafter the defendants, claiming to reserve their objections to the jurisdiction (p. 58), answered the complaint and, among other things, in lieu of demurrer, denied that the complaint made a case entitling the plaintiffs to relief in a court of equity, and for special ground of demurrer alleged (p. 62):

> "That it appears from the plaintiffs' complaint that this court has no jurisdiction of the parties or of the subject matter of this suit, either as an original action or as an ancillary suit, and that it appears on the face of the complaint that no cause of action exists in favor of these plaintiffs for the relief prayed for or for any relief from this court."

Thereupon the solicitor for the defendants, appearing specially, moved for an order calling up and disposing of the issues of law and for judgment on the pleadings dismissing the complaint for the grounds so specified, and for other relief (p. 63). After argument the District Court dismissed the bill (p. 63).

In the opinion upon the said dismissal, Learned Hand, District Judge (p. 66), passing over the question of jurisdiction, determined that the bill was without equity (p. 68), as already stated (*supra*, p. 3).

Thereupon the plaintiffs appealed to the Circuit Court of Appeals for the Second Circuit (pp. 2,

65), and after argument in the Circuit Court of Appeals, the order or decree of dismissal was modified so as to provide that the bill was dismissed for want of jurisdiction, and that the dismissal was without prejudice, and as so modified was affirmed (Opinion of Circuit Court of Appeals and Order for Mandate, pp. 73-77).

The questions of jurisdiction and of want of equity in the bill were raised in the manner above stated, by a motion for judgment on the pleadings on the grounds specified in Paragraph XXVI of the answer, in lieu of demurrer, to wit: want of equity, want of jurisdiction, and absence of cause of action (Answer, par. XXVI, p. 62; Notice of Motion, p. 63; Decree, p. 63).

IV.

Specification of Errors Now Relied On.

The Circuit Court of Appeals erred in the following particulars (pp. 81-82):

It held that the District Court was without jurisdiction, whereas that court had jurisdiction of the said bill in the exercise of its general equity powers as ancillary to the jurisdiction which was invoked and had been exercised by it in the proceedings in bankruptcy, and for the protection of the rights secured thereby to the plaintiffs; and

In reaching such conclusion of the lack of jurisdiction, the Circuit Court of Appeals erroneously misconstrued the effect of the proceedings in the court of bankruptcy, and the protection which should have been and was thereby secured to the plaintiffs and especially Robert M. Thompson; and

In the exercise of the ancillary jurisdiction in equity of the said court, the bill should have been retained and a trial of the issues of fact raised by the pleadings proceeded with.

ARGUMENT.

The determination of the Circuit Court of Appeals was erroneous; the District Court had jurisdiction, and the bill presented a cause of action in equity.

A.

The Circuit Court of Appeals has now, in effect, determined as matter of law that the District Courts of the United States are without ancillary jurisdiction to protect the persons with whom in the course of proceedings in bankruptcy contracts are made under the direction of the bankruptcy court by its receivers in behalf of the estates represented by them in adjustment and final settlement of disputes between the receivers and creditors of the bankrupt estate on the one hand and, on the other hand, persons alleged to be debtors but claiming to be creditors of the bankrupts and to be entitled to a share in the distribution of their assets; and

That such courts are without power to entertain a bill to protect parties to such settlements against the vexatious reopening of such controversy so settled, or to consider the merits of a bill for such relief.

B.

The Circuit Court of Appeals founded its denial of jurisdiction upon a mistaken appreciation of the case presented; it confined its reasoning to the effect of that part of the order of confirmation of the bankrupts' composition which released the bankrupts and Thompson from the claims of those creditors who should assent (p. 75), and overlooked the

fact, equally pertinent, that by a previous order in the same proceeding (Exhibit 8, pp. 48-49) the District Court had already, upon the petition of the receivers in bankruptcy, ratified and approved a contract (pp. 45-48) between the present petitioner Thompson and the said receivers, whereby Thompson undertook to pay obligations of the firm secured by the pledge of property claimed by him as his own, and the receivers undertook to assign said property to him, and he agreed to abide the determination of the Court as to whether he was a general partner or not, and whether the property was his and agreed to hold such property as trustee if the adjudication was adverse to him.

The offer of composition by the bankrupt firm was in consideration (p. 28), among other things,

> "of the release of Robert M. Thompson from *all liability to said S. H. P. Pell & Co.,*"

as well as

> "from any and all liability to any creditor of S. H. P. Pell & Co. who shall assent hereto, on account of any connection of said Robert M. Thompson with said firm or any transaction of said Robert M. Thompson by or through said firm,"

and that Thompson waived and released all claims against the firm and its members (p. 29), and that it was to be adjudged that Thompson was the owner of the securities claimed by him and pledged for loans to the firm, and that Thompson was to assume these loans or to procure evidence of their discharge (p. 30), and that the petitions against Thompson as a general partner were to be dismissed.

The order of confirmation adjudged (p. 51) that it was for the best interests of the estate and

the creditors that the settlement with Thompson set forth in the petition of the bankruptcy receivers (p. 43, fol. 78) and in the offer of composition be made, that his property be delivered to him, that he deliver a release against the bankrupts, the receivers and the estates of the firm and its general partners, and upon his compliance (p. 51),

> "shall be relieved of any further liability to the said receivers or to the estate by reason of the order heretofore entered in this Court dated January 6, 1915, or otherwise."

The order entered January 6, 1915 (Exhibit 8, p. 48), was the order ratifying Thompson's contract with the receivers.

The present petitioners maintain that the order of confirmation had a far wider effect than was accorded to it by the Circuit Court of Appeals, that it adjudicated that Thompson was *not* a general partner nor liable to anyone whomsoever for the debts of the firm on that account, and that he parted with valuable rights as the consideration for what he obtained, and that he should be able to invoke the aid of the Court, which ratified his settlement of the controversy, to prevent its relitigation elsewhere, especially as he can never be reinstated in the position which he occupied when he made his bargain and relinquished a scheduled claim of $3,373,082.30 and assumed obligations of $2,150,000 in order to free his own securities and forever settle the controversy with the bankrupt estate and the creditors thereof as to his status as a general or special partner (*vide* Receiver's Petition, p. 43, f. 78).

It would be unconscionable, the petitioners insist, to let Thompson be assailed in a foreign court, where he could not or might not effectually avail

himself of these facts, or reinstate himself in his former position, or even to require him to relitigate there the question which had been settled, once for all and finally, in the District Court.

C.

The Facts Disclosed by the Bill.

Robert M. Thompson, claiming to be a special partner and relying upon his contract in settlement of the controversy with the creditors and bankruptcy receivers of S. H. P. Pell & Co., approved by the court in bankruptcy, withdrew his scheduled claim of $3,373,082.30 (Bill, p. 6), assumed the bankrupt firm's obligation to pay loans obtained by the bankrupt firm upon property belonging to him, the original amount of which was $2,150,000 (Bill, p. 55; Schedule D, p. 38), and secured a decree or order from the Bankruptcy Court, in terms discharging him from all further liability (Bill, Exhibit 9, p. 49); and yet the defendants *needlessly and uselessly, and with the intent to annoy, vex and harass, at great expense, remote from the home and place of occupation of the plaintiffs* (Bill, p. 11), and without any offer to restore, now seek in another jurisdiction to subject him to further liability for the debts of the firm. The situation is one which ought to appeal forcibly to a court of equity for relief.

The determination creates an unjustified exception from the general rule respecting ancillary jurisdiction of the courts of the United States to protect persons deriving rights or claiming to derive rights under their decrees. Thompson disputed his liability as debtor and claimed to be a large creditor of the bankrupt estate (p. 43), and he under-

took by contract made with the receivers of the bankrupt estate, with the approval of the court in bankruptcy and the consent of the statutory majority of the creditors (Petition, p. 43, f. 78) to settle the entire controversy and dispute as to his relations with the bankrupts and their estate. By such settlement he was induced, in reliance thereon, to forego large advantages, represented by a claim set forth in the schedules to amount to $3,373,082.30 (Exhibit 5, p. 27); and defendants induced the same by acknowledging themselves to be debtors of the bankrupt estate, and as such paid a claim alleged against them by the receivers in bankruptcy as debtors. A more striking case for the intervention of equity it would be difficult to conceive.

The divergence of judicial opinion in this very case upon the question of the jurisdiction of the court is noteworthy.

When the jurisdictional question was first raised upon special appearance of the defendants, Circuit Judge Hough was of the opinion that there was jurisdiction to entertain the suit, and at all events that there was enough in the suit to entitle the plaintiffs to a full trial (p. 68), yet the District Judge (Learned Hand) who heard the argument upon the demurrer, passed over the questions of jurisdiction (p. 66) and reached the conclusion that there was no ground for equitable intervention because the order approving the compromise was tantamount to a discharge in bankruptcy and that consequently the bill was without equity, and the Circuit Court of Appeals modified the decree and dismissed without prejudice, and solely for want of jurisdiction (Opinion and Order for Mandate, pp. 73-77).

D.

The Court had the ancillary jurisdiction invoked over the subject-matter; on the merits a case was made out for the relief sought and for the exercise of the jurisdiction; and confusion has arisen between the existence of jurisdiction and the existence of facts to justify its exercise.

Thompson's situation should appeal strongly to the conscience of a chancellor; he claimed to be a special partner of the bankrupt firm, free from liabilities for its debts; but in reliance upon his contract of compromise and settlement of a dispute with the receivers in bankruptcy of the firm, which was formally ratified and approved by the court in bankruptcy, he withdrew his scheduled claim as a creditor for $3,373,082.30 (Bill, p. 6) and assumed the obligation to pay loans upon property belonging to him, but pledged for the firm obligations, the original amount of which was $2,150,000 (Bill, pp. 30, 38, 46), and secured a decree from the Bankruptcy Court in terms discharging him in consideration of this conduct from all further liability (Bill, Exhibit 9, pp. 49-51); and yet, without any offer or attempt to restore him to his former position, the defendants now assail him in a foreign jurisdiction to answer to them for an alleged debt of the firm; and by the action of the courts below he is remitted to the mercies of the foreign court for his defense.

The decision and mandate of the Circuit Court of Appeals, which modified the decree of dismissal so as to dismiss the bill without prejudice for want of jurisdiction, recognized the general principles of ancillary jurisdiction for which we contend (Opinion, p. 74), but unduly limited (if it does not wholly

exclude) them in application by misinterpreting the effect of the proceedings in bankruptcy as an insufficient basis for the recognition of the ancillary jurisdiction as applicable to the cause before the Court.

The sole ground upon which jurisdiction was invoked was that the plaintiffs, regardless of the residence or citizenship of the parties, were entitled to appeal by bill in equity to the Court which rendered the decree and authorized the proceedings upon which they relied to protect them against the inequitable and harassing disregard thereof, to the detriment and annoyance of the plaintiffs.

E.

The Basis of Ancillary Jurisdiction to Protect Rights Obtained under Previous Decrees.

The opinion of the Circuit Court of Appeals very properly announces the general principle upon which such jurisdiction is assumed.

It says (Record, p. 73):

> "In *Street's Federal Equity Practice,* vol. 2, sec. 1229, that writer says: 'It is a rule, subject to but one exception, that jurisdiction in an ancillary proceeding is supported by the jurisdiction of the court in the main, or principal cause. Hence the ordinary jurisdictional averments may be dispensed with in such a proceeding. If a court has jurisdiction of the principal suit, it also has jurisdiction of any ancillary proceeding in that suit. Neither the citizenship of the parties, nor the amount in controversy, nor any other factor that would ordinarily determine jurisdiction, has any bearing on the right of the court to entertain that proceeding.'

"The one exception above referred to relates to an ancillary receivership and with that we are not now concerned. The right of a Federal court to sustain jurisdiction of an ancillary suit without reference to the citizenship of the parties was fully considered in *Krippendorf* v. *Hyde*, 110 U. S. 276, which reviewed the authorities (citing additional authorities).

"The jurisdiction of a court over a particular subject matter and that court's power to apply a remedy no doubt are coextensive. So that demands which are ancillary to the main action may be taken cognizance of by the court and determined in aid of its authority over the principal matter. *And a court may entertain proceedings ancillary to its judgment or decree*, for the jurisdiction it originally acquired is not exhausted by the entry of the judgment and the power is still in the court to issue all proper process and take all proper proceedings for the enforcement of its judgment. All this is familiar doctrine and well established law.

"An ancillary suit may be maintained:

1. To aid, enjoin or regulate the original suit.

2. To restrain, avoid, explain or enforce the judgment or decree entered in the original suit.

3. To enforce or adjudicate liens or claims to property in the custody of the court in the original suit.

4. *To prevent the relitigation in other courts of the issues heard and adjudged in the original suit*, and to protect the titles and rights acquired under its judgment or decree from attack based on the theory that the adjudication in the original suit was illegal or ineffective (citing authorities).

"In *Bates on Federal Equity Procedure,* Vol. 1, Sec. 97, the doctrine is summarized as follows:

"A bill filed to continue a former litigation in the same court, or *which relates to some matter already partly litigated in the same court,* or which is an addition to a former litigation in the same court, by the same parties or their representatives standing in the same interest, *or to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court* by the same or additional parties, standing in the same interest, or to prevent a party from using the proceedings and judgment of the same court for fraudulent purposes, or to restrain a party from using a judgment to perpetrate an injustice, or obtain an inequitable advantage over other parties to the former judgment or proceedings, *or to obtain any equitable relief in regard to, or connected with, or growing out of any judgment* or proceeding at law rendered in the same court, or to assert any claim, right or title to property in the custody of the court, or for the defense of any property rights, or the collection of assets of any estate being administered by the court, is an ancillary suit."

F.

The Error of the Circuit Court of Appeals.

The error of the Circuit Court of Appeals consisted in misapplying the principle to the facts of this case by overlooking its very essential aspects.

G.

Thompson a Special Partner.

The bill averred that S. H. P. Pell & Co. was a limited partnership under the laws of New York (p. 3). Thompson was a special partner (Bill, p. 3). These facts are admitted by the demurrer. Thompson was shown by the bankrupts' schedules to be a creditor in the sum of $3,373,082.30 (Bill, p. 6; Exhibit 5, p. 27); for a valuable consideration he bargained with the receivers (Exhibit 7, p. 47), with the Court's approval (Exhibit 8, pp. 48-49), for the advantages secured to him by the settlement. He was not adjudicated a bankrupt, but as part of the settlement the petitions to have him so adjudicated were dismissed (p. 52).

[The general partners only are spoken of herein as "the bankrupts."]

Thompson's liability as special partner was fixed by the limited partnership law of New York:

(*McKinney's Consolidated Laws of New York, Annotated*, Book 38, p. 55.)

> "Sec. 36. Liability of partners. The general partners in such partnership shall be jointly and severally liable as general partners are by law. *The special partners shall not be liable for the debts of the partnership beyond the sum contributed by them respectively to the capital of the partnership.*"

The offer of composition which was made by the bankrupts, the two Pells and Kittle, was upon certain recited considerations (pp. 28, 29), among which was one very important consideration to which the Court of Appeals did not give proper effect, namely, that Thompson should be released

from any and all liability to the firm and its creditors (p. 28, 51 *ff.* 95-96).

Thompson, being admitted by the demurrer to have been a special partner, was not liable by reason of his connection with the firm, except to the firm upon his dealings therewith, and the result of these dealings was a matter of dispute with the receivers, and in the bankruptcy proceedings. Two creditors sought by petitions therein to have him adjudicated a bankrupt in the proceeding (Exhibits 1 and 2, pp. 15-18); a subpoena was duly served upon him (Exhibit 3, p. 24), and he thereby became a party to the bankruptcy proceeding, amenable to the orders of the Court. The order of confirmation of the compromise agreement and the offer of composition was entered after hearing counsel for the bankrupts and Thompson (Exhibit 9, p. 50); it directed the transfer to a trustee under the composition agreement

> "of all the assets and property of S. H. P. Pell & Company" (p. 51),

as well as of the bankrupts individually and as co-partners, and

> "of all the right, title and interest of S. H. P. Pell & Company,"

as well as of the bankrupts individually and as co-partners in and to the same (p. 51); it directed the receivers to retain certain assets (pp. 94-95).

H.

Thompson Was Expressly Released.

The order of confirmation also contained the following clause (p. 51):

> "Ordered, Adjudged and Decreed that it is for the best interests of the estate and of the creditors thereof that the settlement with Robert M. Thompson set forth in said offer of composition and the transfer of the property to him referred to in said offer, shall be made, and the property described and set forth in schedule 'E' is hereby directed to be delivered to said Robert M. Thompson and upon the said Robert M. Thompson executing and delivering to the receivers a release of any and all claims which he may have against the bankrupts, against the receivers thereof, and the estates of S. H. P. Pell & Company and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell and in all respects complying with the terms of the offer of composition on his part to be performed, *and thereupon the said Robert M. Thompson shall be relieved of any further liability to the said receivers or to the estate by reason of the order heretofore entered by this Court dated January 6, 1915, or otherwise.*"

I.

Thompson's Settlement of a Dispute.

The Circuit Court of Appeals appears to have overlooked the fact that upon the demurrer Thompson must be treated as a special partner. In the bankruptcy proceedings he occupied a disputed

position; there he claimed to be a special partner and the largest creditor (his claim scheduled as creditor was $3,373,082.30 [Exhibit 5, p. 27]; no other creditor mentioned in the Schedule C [pp. 36-38] annexed to the offer of compromise had a claim larger than $140,000); his position was assailed in the proceeding by creditors (Exhibits 1 and 2, pp. 15, 18); he was made a party to the proceeding by subpoena (Exhibit 3, p. 24); he made a bargain with the receivers with the approval of the Court concerning certain of his disputed rights to the property seized by the receivers and the claim made by them and the creditors that he was a general partner (Exhibit 7, p. 41), the Court ratified and approved his contract (Exhibit 8, p. 48), and in the order confirming the compromise and the offer of composition which provided for the transfer of all firm assets (with certain specific reservations) to the selected trustee thereunder, and adjudged that it was for the best interests of the estate and the creditors thereof that the *settlement* with Thompson be made, and that he release to the receivers any and all claims against the bankrupts, the receivers, the estates of S. H. P. Pell & Co. and the bankrupts, comply with the terms of the offer on his part to be performed (p. 96), and that thereupon Thompson should be relieved

> "of *any* further liability to the said receivers or *to the estate* by reason of the order heretofore entered in this Court dated January 6, 1915, or *otherwise*" (p. 96).

J.

The Circuit Court of Appeals Disregarded the Effect of Thompson's Settlement.

The Circuit Court of Appeals instead of recognizing in this a *settlement* between the estate of the bankrupts and Thompson, and as securing to Thompson a complete immunity from all claims whatsoever of anybody whomsoever claiming through or under the firm or any of its transactions as a firm, because Thompson had been discharged of all obligation to the firm or its estate, confined its opinion (p. 73 *et seq.*) to the terms of the offer of composition as a discharge of the liabilities of the firm and of the bankrupts to their creditors.

The District Court, however, "treated the order as though it effectively released Thompson—but whatever rights Thompson got were to be used like a discharge in bankruptcy" (p. 67).

The proceedings in the cause discharged Thompson (the special partner), by *contract* made under the auspices of the Court from all liability to the firm and anyone claiming under it, whereas the Circuit Court of Appeals considered only the effect of the confirmation of the composition as a discharge in bankruptcy of the bankrupts and Thompson, wholly overlooking and ignoring the decretal part releasing Thompson and dismissing the petitions against him.

It might be, though we dispute it, that the discharge of the *bankrupts* was limited to those who assented thereto, but the discharge of *Thompson* was a *release* of his entire liability of every sort to the firm, its receivers and its estate, and consequently to everyone claiming under the firm or any of the bankrupts.

Instead of giving the full or any effect to this settlement of the controversy between Thompson and the receivers and firm creditors, which, so far as Thompson was concerned, was the very essence of this bargain, the Circuit Court of Appeals overlooked this effect entirely and said:

> "But the difficulty with the maintenance of this suit is that it cannot be regarded as in any proper sense an ancillary suit. It was instituted upon the theory that the proceedings in the District Court for the Southern District of New York in the bankruptcy matter of S. H. P. Pell & Co., discharged Stephen H. P. Pell & Co. as a firm and Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell individually from all claims against the firm of S. H. P. Pell & Co., but that it also discharged therefrom Robert M. Thompson. But this is to lose sight of the terms of the composition, which provided for the release of Thompson 'from any and all liability to any creditor of S. H. P. Pell & Co. who shall assent hereto, on account of any connection of said Robert M. Thompson with said firm or any transaction of said Robert M. Thompson by or through said firm.'
>
> "The release of Thompson was to apply only to those who specifically assented thereto. And there is no allegation anywhere in the complaint in the present action that the defendants herein assented to the composition."

This entirely overlooks and ignores the additional specific provisions of the release of Thompson, quoted at length above (pp. 23, 24).

The fallacy of this language of the opinion lies in its confinement of Thompson's appeal to the offer of composition to limit the terms of the decree and ignoring the settlement and compromise. Admitting for the purpose of argument only that the

Bankruptcy Court committed error in its decree of release, that can only be corrected by appeal or revision and not by collateral attack.

Where the meaning and provisions of a judgment are clear and definite, it cannot be altered or changed by anything within the judgment roll.

23 *Cyc., Title Judgment,* p. 1534, note 83.

The terms of the offer of composition cannot possibly limit the express language of the decree releasing Thompson.

It cannot be assumed that the McCabe firm did not assent, the decree does not so recite and it does "relieve" Thompson from *all* further liability.

It was not necessary to allege in the present bill that the McCabe firm assented, the question of the sufficiency and extent of the assents to carry the Court's settlement with Thompson into effect was peculiarly a question for the Bankruptcy Court, and its decree providing for and granting a release to Thompson was not limited by the terms of the composition, but was absolute in form, and it reserved no rights in anybody against Thompson and required no assent.

K.

Thompson's Position.

The opinion of the Circuit Court of Appeals (p. 75) says that the question whether Thompson was a special or general partner was not adjudicated, although it shows (p. 72) in its introductory summary of facts that this matter was in dispute and involved in the settlement with Thompson. But however that may be, it cannot be denied *in this suit* for the purposes of the demurrer that he was

merely a special partner as he alleges (Bill, p. 3).

As such special partner, all his obligations to any and every creditor of the firm, whether tort or contract, were measured by his making his agreed contribution to the capital of the partnership (*supra*, p. 22). That he did this to the full legal limit is implicit in the settlement and decree of confirmation thereof, and hence he is immune from successful attack by any creditor of the firm, however the alleged right of such creditors arose against the firm.

It is not the discharge of the *debt* of the Pell firm to the McCabe firm upon which the plaintiffs necessarily rely, but the complete release of Thompson from all liability of every sort by his settlement with the receivers, approved by the Court. For that purpose the receivers represented every right of the firm and those claiming under it against Thompson in respect to his obligations for firm debts upon any and every cause of action whatsoever.

Grasselli etc. v. *Aetna Ex. Co.*, 252 Fed., 456, and cases cited at page 460.

It is not a "discharge in bankruptcy" in any acceptance of that term upon which Thompson relies in this suit, but the release of his entire liability to the firm and the estate and to the receivers, effected by his own compromise, release and settlement, *not* only with the creditors who assented to the composition, or who proved their claims, or who had provable claims, but with every person whomsoever who could claim against the firm or any of its members, or its assets, or its receivers or hold him in any way answerable for any obligations of the firm. Upon performance by Thompson the Court *"relieved"* Thompson from every claim for any transaction of the firm.

The complaint in South Carolina (Bill, pp. 54-56) asserts a firm fraud; the liability asserted is by reason of the alleged wrong of the partnership; it may be that the claim for that fraud of the firm was not discharged by the effect of the technical discharge of the bankrupts, but it is nevertheless a firm obligation, and though it may survive a discharge in bankruptcy, it did not survive against a special partner after he had settled a dispute as to his obligations to the firm with the receivers of the firm and his settlement had been ratified and approved by the Bankruptcy Court (Opinion, p. 67, f. 126).

The Court in Bankruptcy had the power to appoint the receivers to take charge of the property of the bankrupts, to authorize their business to be conducted, to bring in Thompson as an additional party as necessary for a complete determination of a matter in controversy (namely, his relations to the firm, the estate and the bankrupts), to cause the estate of the bankrupts to be collected and to *determine* controversies in relation thereto.

> *Bankruptcy Law,* Section 2 (Act 1898, July 1, as amended February 5, 1903, June 25, 1910).

Of these powers, *Collier on Bankruptcy,* 11th Ed., 1917, p. 67, says (in respect to bringing in parties):

> "This power is an important one in bringing about a *complete determination* of the rights of all parties interested in the property subject to the proceeding."

And again:

> "The power to bring in additional parties as conferred by this subdivision (6 of Sec. 2) is sufficiently broad to permit the bringing in of any person who has *any* claim or interest which may be properly determined in the proceedings."

L.

The Denial of the Ancillary Jurisdiction.

The ground upon which the Circuit Court of Appeals denied the existence of an ancillary jurisdiction applicable to this cause was that the confirmation of the composition limited the discharge of Thompson to those who *"specifically"* assented thereto (Opinion, p. 75) and that it is not alleged that the defendants assented.

This emphasizes the confusion pointed out (*supra*, p. 18) between the existence of jurisdiction and the existence of facts to justify its exercise.

This conclusion overlooks three considerations:

1. That there may be and was an "assent" by the defendants arising from their knowledge and silence or failure to oppose or raised by operation of the Bankruptcy Law (*infra*, p55).

2. That Thompson (whose special partnership is admitted by the demurrer) secured a complete release by *contract* with the receivers and the court, of a controversy respecting his *status* as a general partner of the firm, and an effective adjudication of a matter in issue within the jurisdiction of the Bankruptcy Court, to wit: that he was not a general part-

ner and not liable for the debts of the firm; that such adjudication was not a mere nonsuit, but founded upon an effective *retraxit* (*infra*, pp. 40, 41), and that it bound all creditors whomsoever of the firm, by virtue both of the contract with the receivers and its ratification by the Court and further by the confirmation of the offer of composition which imposed that condition on the creditors.

3. That the decree in terms discharged Thompson from all liability (*supra*, p. 24), and if this was error it cannot be reviewed in this suit.

M.

The Errors of Law.

In these matters these petitioners contend that the Circuit Court of Appeals erred in the following respects:

I. Regarding Thompson as a special partner, it is a necessary implication of his settlement with the receivers (pp. 47, 48) and of the order confirming the compromise (pp. 49-53, 28-41) that Thompson was fully discharged against all the world for all liability to or for the firm (*infra*, p. 53).

II. Whether Thompson was in fact a general or a special partner, the settlement and decree protects him against the defendants' alleged claim, for they knew of the proceedings (p. 5); they made no claim as creditors, but accepted the status of debtors by paying their scheduled debt of $261.52 (p. 5), and cannot afterward change their position to the disad-

vantage of Thompson, who withdrew his scheduled claim of $3,373,082.30 in the settlement (p. 6; *infra*, p. 45).

III. The ancillary jurisdiction invoked exists and should have been exercised (*infra*, p. 57).

POINTS.

I.

Regarding Thompson as a special partner, it is a necessary implication of his settlement with the receivers and of the decree confirming the composition that Thompson was fully discharged against all the world for all liability to or for the firm of S. H. P. Pell & Co.

The demurrer necessarily admits the allegation of the bill (p. 3) that Thompson was a special partner. The law of New York (*supra*, p. 22) determines the extent of his liability as such.

The dispute as to his relationship and liability having arisen in the bankruptcy proceedings (pp. 15-25), his settlement with the receivers (Exhibit 7, pp. 41-48, especially p. 43) and its ratification by the order of January 6, 1915 (Exhibit 8, pp. 48-49), and the offer of composition (pp. 28-41), and the order of confirmation (Exhibit 9, pp. 49-53), effectually adjudicated the facts in issue, dismissed the petitions against Thompson (pp. 31, 51) and in effect adjudicated all of his duties and obligations to or for the firm, and released all others (p. 51).

The receivers' petition for instructions represented (Exhibit 7, p. 43) that Thompson claimed

to be a special partner; that certain creditors had filed intervening petitions seeking an adjudication of bankruptcy against him as a general partner; that the pending offer of composition provided for the settlement of all questions and disputes with Thompson and for the dismissal of the intervening petitions against him (p. 43); that Thompson, who claimed as a creditor, claimed $2,500,000, and other creditors to the extent of $2,300,000 out of $2,500,000 had accepted the composition, and 160 out of 285 of the creditors had accepted; *that the receivers, subject to the approval of the Court, had entered into a contract with Thompson,* all of which was for the best interest of the estate (pp. 43-44). The *contract* with Thompson was annexed (p. 45), whereby Thompson bound himself to the receivers to pay certain loans upon securities claimed by him, but to hold the securities as trustee if he should be adjudged a general partner. The Court, by order of January 6, 1915 (Exhibit 8, p. 48), ratified the *contract*. The order of confirmation of the composition agreement (Exhibit 9, p. 51) "relieved Thompson" from all liability to the receivers or the estate, by reason "of the order heretofore entered by this Court dated January 6, or *otherwise.*"

IN THIS RESPECT THE DECREE IN QUESTION IS A DIRECT ADJUDICATION, BECAUSE IT PROVIDES (p. 52):

> *"It is further Ordered, Adjudged and Decreed* that the intervening petitions filed herein by Logan & Bryan and by Heineken & Vogelsang and others, shall be and they are hereby dismissed."

The dismissal of these petitions is *a judicial demonstration* that the status of Thompson as determined by the Bankruptcy Court was not that of

a general partner, and the attempt to hold him now as a general partner in the South Carolina action, in face of the dismissal of the petition, is a *bald* and unjustifiable attempt to *relitigate* this *particular* question.

U. S. v. *Cal. & Ore. Co.*, 192 U. S., 355.

In *Union Bank* v. *Geary* (5 Peters, 99, at p. 114) Mr. Justice Thompson says:

> "The consideration alleged in the bill is relinquishing all defense in the action and confessing a judgment; averring that the complainant had a valid legal defense, which would have defeated the right of the bank to recover on the indorsement, no due and legal demand having been made of the maker, and notice thereof given to the indorser. * * * And to permit a subsequent judicial decision on this point in their favor, as having a retrospective effect, so as to annul a *settlement or agreement* made by them under a different state of things, would be sanctioning a most mischievous principle."

In *Re First Nat. Bank* (152 Fed. Rep., 64, at p. 70) Sanborn, Circuit Judge, says:

> *"The adjudication is therefore a demonstration* that the court below adjudged that the Widell Company was thus engaged, since it could not have lawfully made the adjudication without such a decision. That judgment, therefore, conclusively estops the complaining creditors here and everywhere from proving the contrary to avoid the adjudication in bankruptcy until the latter is reversed or vacated in some direct proceeding. *Dowell* v. *Applegate*, 152 U. S., 327, 340; *Foltz* v. *St. Louis & S. F. R. Co.*, 60 Fed., 317, 319; *Board of Commissioners* v. *Platt*, 79 Fed., 567, 570."

In *Re Swofford Bros.* (180 Fed. Rep., 549, at p. 557) Van Valkenburgh, District Judge, says:

> "This option rested with the creditors and their representatives in the court. *The release of Swofford was a substantial feature of the agreement.* Whatever rights against him may have existed in others beside the creditors had vested in the trustee in bankruptcy, *and a release by this court was complete and absolute.* * * * It will not do to say that the court of bankruptcy, through its referee and trustee, may have made a bad bargain, or may have acted unwisely. *No court can recognize such a criticism in a collateral proceedings. Moreover, if such considerations are to be urged, it must be in the same court where the matters were litigated by seasonable and appropriate application to that tribunal. There, and not elsewhere, the remedy, if there be one, lies.*"

In *Hall* v. *Ames* (182 Fed. Rep., 1008, at p. 1014) Putnam, Circuit Judge, says:

> "But it is insisted that relief is sought for here which was not in issue before the Supreme Judicial Court of Maine, or not disposed of by it. *All these propositions are met by the fundamental fact that we could not get at those additional issues without walking over the body of what has been decided by that court, or held in reserve by it.* We are not at liberty to restrict in any way the powers of that court over the subject-matter involved here, either directly or indirectly, with reference to what has been done or has not been done, or by anticipating what may or may not be done. This is a fundamental rule, stated in *Memphis City* v. *Dean*, 8 Wall., 64."

Under Section 27*a* of the Bankruptcy Law the Court had absolute power to make the compromise, and under Subdivisions 7 and 15 of Section 2 to determine the entire *controversy.*

THE ISSUE SQUARELY RAISED IN AND PRESENTED TO THE BANKRUPTCY COURT WAS WHETHER OR NOT ROBERT M. THOMPSON WAS A GENERAL PARTNER OF THE BANKRUPT FIRM, WHOSE COMBINED ASSETS, INDIVIDUAL AND PARTNERSHIP, WERE INSUFFICIENT TO PAY THE PARTNERSHIP LIABILITIES.

The facts admitted by the demurrer are:

1. The firm of Pell & Co., including S. H. P. Pell, Charles A. Kittle and Howland H. Pell as admitted partners thereof, had been adjudicated involuntary bankrupts.
2. Petitions in the same proceeding had been filed to have Robert M. Thompson adjudged to be a general partner and adjudicated an involuntary bankrupt.
3. Robert M. Thompson's individual assets were insufficient to pay the deficiency of firm liabilities over the assets of the bankrupt estate, which was admitted by Thompson.

The status of Robert M. Thompson as a general partner was the crux of the controversy raised in and presented to the Bankruptcy Court.

Within the adjudications the Bankruptcy Court had jurisdiction upon the establishment of these facts to pass an adjudication in bankruptcy against Robert M. Thompson and the decree finding his status of general partner would have been conclusive against the world and, *a fortiori*, the dismissal of the petition would be equally conclusive.

(a) As to the power to adjudicate upon these facts.

See

In re Samuels, 215 Fed. Rep., 845, 849, C. C. A., 2nd Cir.

Armstrong v. *Fisher,* 224 *id.,* 97, 99, C. C. A., 8th Cir.
Ft. Pitt etc. Co. v. *Diser,* 239 *id.,* 443, 447, C. C. A., 6th Cir.
Francis v. *McNeil,* 228 U. S., 701.

(*b*) As to the conclusiveness and invulnerability of the decree to collateral attack even by strangers.

We cite—

In *Gratiot etc. Bank* v. *Johnson* (U. S. Supreme Court Advance Opinions No. 11, April, 1919, page 317, at page 319) Mr. Justice Brandeis says:

> "The adjudication is, for the purpose of administering the debtor's property, that is, in its legislative effect, conclusive upon all the world. Compare *Shawhan* v. *Wherritt,* 7 How. 627, 643. So far as it declares the status of the debtor, even strangers to the decree may not attack it collaterally. *Michaels* v. *Post,* 21 Wall., 398, 428; *New Lamp Chimney Co.* v. *Ansonia Brass & Copper Co.,* 91 U. S., 656, 661, 662. Compare *Hebert* v. *Crawford,* 228 U. S., 204, 208, 209. But an adjudication in bankruptcy, like other judgments *in rem,* is not *res judicata* as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto. *Manson* v. *Williams,* 213 U. S. 453, 455."

In *Michaels* v. *Post* (88 U. S., 21 Wall., 398, at page 428) Mr. Justice Clifford says:

> "Such a decree adjudging a debtor to be bankrupt is in the nature of a decree *in rem* as respects the *status* (italics) of the party, and in case the court rendering it has jurisdiction it is only assailable by a direct pro-

ceeding in a competent court, if due notice was given and the adjudication is correct in form. *Way* v. *Howe,* 108 Mass. 503; *Ex parte Wieland,* L. R., 5 Ch. App., 489; *Woodruff* v. *Taylor,* 20 Vt. 65; *Mankin* v. *Chandler,* 2 Brock., 126; *Shawhan* v. *Wherritt,* 7 How., 643; *Imrie* v. *Castrique,* 8 C. B. (N. S.), 407; *Carter* v. *Dimmock,* 4 H. L. Cas., 346."

In *Shawhan et al.* v. *Wherritt* (7 How., 628, at page 643, 47 U. S.) the Court, in disposing of the objections to the decree of the Bankruptcy Court, says:

"1. That the decree in bankruptcy was not evidence, as against the defendants, who were no parties to it, either that there was a debt due to the petitioning creditor, or that Brandon was a merchant or trader within the meanig of the Bankrupt Act, or that he had committed an act of bankruptcy. It is a sufficient answer to this objection, 1st. That the thirteenth section of the Bankrupt Act declares that 'the proceedings in all cases of bankruptcy shall be deemed matters of record.' 2d. Both parties admit the deed made by Brandon, on the 6th of April, was fraudulent, and the first section of the Bankrupt Act declares the execution of such a deed an act of bankruptcy. 3d. The record before us shows sufficiently that he was a merchant or trader, and therefore liable to be declared a bankrupt. The District Court had, therefore, plenary and exclusive jurisdiction of the subject matter. 4th. The public notice required by the act having been given, the creditors must be treated as having notice of the proceedings, and an opportunity to make their objections to them, and having neglected or refused so to do, they ought not to be allowed to impeach them collaterally, as they are in the nature of a proceeding *in rem,* before a court of record having jurisdiction. 5th. Even if the record in the Bankruptcy Court be not conclusive as

against the defendants, it is at least *prima facie* evidence that all facts necessary to sustain the decree were proved before the court; and lastly, the record of this case shows sufficient evidence to sustain the decree on all points. * * * As the court had jurisdiction of the subject matter and person of the bankrupt, the decree is thus made conclusive evidence of the title of the assignee."

In *Lamp Chimney Co.* v. *Ansonia Brass etc. Co.* (91 U. S., 656, at page 661) Mr. Justice Clifford says:

"Such a decree, adjudging a corporation bankrupt, is in the nature of a decree *in rem*, as respects the status of the corporation; and, if the court rendering it has jurisdiction, it can only be assailed by a direct proceeding in a competent court, unless it appears that the decree is void in form, or that due notice of the petition was never given. *Way* v. *Howe*, 108 Mass., 503; *Ex parte Wieland*, L. R., 5 Ch. App. 489; *Bk.* v. *Olcott*, 46 N. Y. 15; *Revell* v. *Blake*, L. R., 7 C. P. 308."

In *Herbert* v. *Crawford* (228 U. S., 204, at page 208) Mr. Justice Lamar says:

"Under these decisions the physical possession of the crop brought the property within the exclusive jurisdiction of the bankrupt court. The finding in the summary proceeding that LeBlanc had received possession, as trustee, was conclusive against him, and was not subject to collateral attack by third persons. *Noble* v. *Union Pacific Logging Co.*, 147 U. S. 173, 174, and cases cited."

THE DISMISSAL OF THE INTERVENING PETITIONS UPON WHICH THE ADJUDICATED SETTLEMENT WAS BASED WAS A *retraxit* AND THE CONFIRMED COMPRO-

MISE IS AN ADJUDICATION THAT THOMPSON WAS NOT A GENERAL PARTNER, AND THAT ALL CONTENTIONS THAT HE WAS LIABLE TO THE BANKRUPT ESTATE AND ITS CREDITORS WERE JUDICIALLY DETERMINED BY THE DISMISSAL.

23 *Cyc.*, Tit. *Judgment, Retraxit,* 1138, note 43.

United States v. *Cal. & Ore. Co.*, 192 U. S., 355.

In *United States* v. *Parker* (120 U. S., 89, at p. 93) Mr. Justice Matthews says:

> "It is stated, by way of recital in the judgment itself, that it thus appeared to the court 'that the subject-matter in this suit has been adjusted and settled by the proper parties in Washington.' This recital, together with the judgment founded on it, was entered by the consent of the attorney representing the United States, who thus in open court officially admitted the effect of the evidence to be as claimed."

At page 95, Mr. Justice Matthews says:

> "But a non-suit is to be distinguished from a *retraxit*. *Minor* v. *Mechanics Bank*, 26 U. S., 1 Pet., 46. Blackstone defines the difference as follows: 'A *retraxit* differs from a non-suit in this: one is negative and the other positive. The non-suit is a mere default or neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open, voluntary renunciation of his claim in court, and by this he forever loses his action.' 3 *Bl. Com.*, 296. And it has been held that a judgment of dismissal, when based upon and entered in pursuance of the agreement of the parties, must be understood, in

> the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy, by the parties themselves through the judgment of the court, as will constitute a defense to another action afterwards brought upon the same cause of action. *Bank of Commonwealth* v. *Hopkins,* 2 Dana, 395; *Merritt* v. *Campbell,* 47 Cal., 542. It is clearly so when, as here, the judgment recites that the subject-matter of the suit had been adjusted and settled by the parties."

THE CONTRACT BETWEEN THE BANKRUPTCY RECEIVERS AND ROBERT M. THOMPSON, IN REALITY THE "CONTRACT OF THE COURT," WHICH SHOULD CERTAINLY BE MAINTAINED FREE FROM ATTACK, WAS MADE BY THE ORDER OF JANUARY 6, 1915, DIRECTING THE RECEIVERS TO EXECUTE THE AGREEMENT OF SETTLEMENT AND CONFIRMED BY THE DECREE OF JANUARY 25, 1915.

Of contracts with receivers it has been said:

> "On the other hand, it is insisted that it is the duty of the court to see that contracts made by its orders are performed; that it ought not to remit the holder of *such a contract* to the remedies of debt or lien holders; but on the mere suggestion of omission or failure, itself take measures to secure performance, and such measures as will most certainly and promptly secure it. In other words, it owes to the holders of its contracts, not the duty merely of providing a forum in which such holders may enforce performance; it owes performance. * * * I agree with the last named views. The court should be chary of promise, but eager of performance."

Brewer, *J.*, in

Farmers L. & T. Co. v. *Burlington, Etc.*,
32 Fed. Rep., 805, 808.

In *Re Swofford Bros.* (180 Fed. Rep., 549, at pp. 556-557) Van Valkenburgh, District Judge, says:

> "The court and its officers clothed with full authority, upon canvassing the possibilities and probabilities in each individual case, will decide what is best to be done from the standpoint of the creditor, and may, and will, act accordingly. *When they have done so, their acts cannot be reviewed and the matter relitigated in another forum and at the suit of the parties or their privies.*
>
> *This court is as bound to protect his acquittance as it is to deliver to him the tangible property he bought.* To hold otherwise would be to render unstable and futile all the proceedings of like nature in a bankruptcy court through which the property of the bankrupt is administered and money is realized from which distribution may be made to creditors."

Here, however, notwithstanding the solemn contract with the receivers in behalf of the bankrupts' estate, the Court has refused both enforcement and forum, and has remitted the defendants to contesting Thompson's liability over again in a distant forum.

In *Re Hollingsworth & Whitney Co.* (C. C. A., 1st Cir., 242 Fed. Rep., 753, at p. 756) Dodge, Circuit Judge, says:

> "The company contends that specific performance of said agreement could not be enforced by summary process in the bankruptcy court. But the agreement was un-

> mistakably made with officers of that court appointed by it in a pending bankruptcy case, and it can only be regarded as made and approved by the court for the purposes of that case. An agreement so made is to be regarded as an agreement with the court wherein the case is pending."

A contract on the part of a receiver is really the contract of the Court.

> *American Bonding etc. Co.* v. *Baltimore etc. Co.,* 124 Fed. Rep., 866, 877 (U. S. C. C. A., 6th Cir.).

See the extent to which this principle has been carried in *Farmers L. & T. Co.* v. *Newman,* 127 U. S., 649, where the Court (p. 659) overruled the contention that one who had contracted with a receiver for a lien upon the property in his custody was remitted to a separate, independent suit for the enforcement of his right; he could apply for relief in the same suit after the confirmation of a sale which disregarded his right.

The petition of the receivers (pp. 41-48) submitted to the Bankruptcy Court presented a controversy in bankruptcy for judicial consideration and equitable relief, viz.:

> 1. That the creditors claimed that Robert M. Thompson *was a general* partner of the bankrupt firm and that the aggregate assets of the firm and partners, including Thompson, were insufficient to pay the firm creditors and had filed petitions to have him declared a general partner in involuntary bankruptcy.
>
> 2. That Robert M. Thompson asserted that he *was a special* partner and denied liability

to the creditors and asserted that he was a scheduled creditor of the bankrupt firm to the extent of $3,373,082.30.

3. That there were securities claimed by Robert M. Thompson which had been pledged by the bankrupt firm to secure loans made by divers financial institutions to the bankrupt firm aggregating $2,100,000, and which were about to be foreclosed, threatening the bankrupt estate with large deficiencies.

4. That it was for *the best interests* of the creditors—

That the creditors' claim against Thompson be withdrawn and the petitions against him be dismissed.

That Thompson redeem the securities by paying off the loans and indemnifying the bankrupt estate against loss.

That Thompson withdraw his claim for $3,373,082.30 and release the bankrupt estate.

5. That the receivers petition the Bankruptcy Court for leave to enter into an agreement with Thompson in performance of the arrangement to effect the settlement of all disputes and differences.

Accordingly, with the *consent* of the statutory majority of the bankrupts' creditors, the Bankruptcy Court made the order of January 6, 1915, under which Robert M. Thompson paid off the bankrupts' liabilities of $2,150,000 and withdrew his claim for $3,373,082.30, and released the bankrupt estate therefrom and was thereupon *"relieved of any further liability to the receivers or the estate"* (p. 51, f. 96).

This clearly was a litigation of the issue of general and special partnership settled and compromised by the sanctioned obligation or contract of the Bankruptcy Court through its receivers with Robert M. Thompson.

Of the duty to maintain the unimpeachable integrity of that obligation the courts have spoken in no uncertain terms.

> *In re Swofford, etc., Co.,* 180 Fed. Rep., 549, at pp. 556-557.
> *Graham* v. *B. H. & E. R. R.,* 118 U. S., 161, 180.
> See *ante,* pp. 35-36.

Express notice to the firm creditors of the proposed settlement and compromise with, and dismissal of the bankruptcy proceedings against, Robert M. Thompson was given by incorporating it in the offer of composition, of which the decree of January 25, 1915, finds:

> "Such composition has been accepted by a "majority in number * * * and amount * * * "and is for the best interests of the cred- "itors. * * *
> "Due notice having been given as required "by Section 58a (3) of said bankruptcy "act. * * *
>
> "ORDERED, ADJUDGED AND DECREED that it is "for the *best interests of the estate and of the "creditors* that the settlement with Robert M. "Thompson set forth in said offer of composi- "tion * * * shall be made * * * and thereupon "the said Robert M. Thompson shall be relieved "of any further liability to the said receivers "or to the estate. * * *"

IT IS CHARGED IN THE BILL (p. 5) AND ADMITTED BY THE DEMURRER THAT THE DEFENDANTS HAD KNOWLEDGE OF THE PROCEEDINGS IN BANKRUPTCY; BUT AT ALL EVENTS, NOTICE WAS UNNECESSARY.

In *Matter of Abrams & Rubins* (23 Am. B. R., 25, at p. 26; 173 Fed. Rep., 430, at p. 431) Hand, District Judge, says:

> "It is quite clear that one who knows he is not included in the schedules takes his own risk of a composition being made and confirmed without his being included. *Re Rudnick*, 93 Fed., 787."
>
> *Knapp* v. *Harold*, note, 11 Am. B. R., 190, note; 25 Ohio Cir. Ct. Rep., 213, note.
> *Cohen* v. *Pinkus*, 126 App. Div., 792; 20 Am. B. R., 787.

In *Re First Nat. Bank* (152 Fed. Rep., 64, at p. 71) Sanborn, Circuit Judge, says of the Bankruptcy Law:

> "The theory of the bankruptcy law is that estates should be converted into money and distributed among the creditors as speedily as practicable. *After a proceeding under it is commenced, the relations of the parties and the nature of the property involved are subject to frequent and rapid changes. Hence creditors who would assail the adjudication or the other orders of the court, and would thereby stop the transformation of the property of the bankrupt and its distribution among his creditors, should act with reasonable promptness after they receive notice of the proceeding and of the reasons of their objection.*"

In *Re Marion, etc., Co.* (D. C., 166 Fed. Rep., 618, at p. 620) Evans, District Judge, says of those having knowledge with the right to participate:

> *"Having this knowledge and this right under the act, they became quasi parties to the proceeding at least sufficiently to make it the duty of each then, or within five days thereafter, to intervene or be foreclosed of the right to do so."*
>
> *Collier on Bankruptcy*, 11th Ed., p. 860.

THE DEFENDANTS HEREIN ARE BOUND BY THE DECREE OF JANUARY 25, 1915, AS PARTIES THERETO, BY REPRESENTATION THROUGH THE RECEIVERS AND THE BANKRUPTCY COURT ITSELF IN BEHALF OF ALL PARTIES (CREDITORS AND BANKRUPTS) INTERESTED IN THE SETTLEMENT OF THE CONTROVERSY.

In *Re Gottlieb & Co.* (D. C., 245 Fed. Rep., 139, at p. 145) Rellstab, District Judge, says:

> *"Adjudication having taken place, the receiver was no longer merely a custodian of property which might be ordered returned to the alleged bankrupt, but of property which was then in the course of administration.*
>
> In addition to the duties devolving upon him as a preserver of property actually in his possession, *he would be a proper person, pending the appointment of a trustee, to carry out any orders that the court might make for the enforcement of the provisions of the Bankruptcy Act under Section 2, subd. 15."*

In *Grasselli Chem. Co.* v. *Aetna Ex. Co.* (C. C. A., 2nd Cir., 252 Fed., 456, at p. 460) Manton, Circuit Judge, says:

"A mistaken notion seems to exist with the appellants that the receivers are appointed for the sole benefit of creditors and are not interested in the benefits to accrue to all other parties interested, such as stockholders. In *Atlantic Trust Co.* v. *Chapman*, 208 U. S., 360, the court said that a receiver

'is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause.'

The possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately judge to be entitled to it. *Porter* v. *Sabin*, 149 U. S., 473."

The bill (Exhibit 7, p. 41) shows that the bankruptcy receivers and the bankrupts' creditors, whose claims aggregated $2,300,000 out of a totality of $2,500,000 (exclusive of Thompson's claim of $3,373,082.30) and aggregating 160 in number of a totality of 285 creditors, were in favor of the execution by the receivers of the agreement to be authorized by the Bankruptcy Court, which was for

"The settlement of all questions and disputes with said Robert M. Thompson and for the dismissal of said intervening petitions against said Robert M. Thompson" (Exhibit 7, p. 43).

In *Re Swofford Bros. Co.* (180 Fed. Rep., 549, at p. 557) Judge Van Valkenburgh says:

"This option rested with the creditors and their representatives in the court. The release of Swofford was a substantial feature of the agreement. Whatever rights against

> him may have existed in others besides the creditors had vested in the trustee in bankruptcy, *and a release by this court was complete and absolute.*"

In *Painter* v. *Painter* (138 Cal. Rep., 231, at p. 237) Van Dyke, *J.*, says:

> "It is apparent that if a judgment against a receiver, where presented to the court having jurisdiction of the receivership proceeding for payment, may be modified, changed or rejected, the trial of the cause in which it was rendered would be but an empty and useless formality. (*Beach on Receivers*, sec. 721.) Nor does this view conflict with the rule relied on by appellants, that a judgment is only conclusive against parties and privies. The receiver represented creditors and the partners. It was not necessary to the conclusiveness of the judgment that the surviving partner and all the creditors, if there were such, as is alleged in defendants' answer, should be made parties to the action against the receiver; nor was it necessary that they should be made parties to the petition for an order to enforce payment."

The approval of the settlement made by the receivers and further set forth in the offer of composition *was carried into the order of the Court* (Decree of January 25, 1915) and upon the faith of the execution of the settlement theretofore made and concluded, the intervening petitions against Robert M. Thompson were dismissed (Complaint, par. 15, p. 11).

23 *Cyc.*, 1248, and cases in Note 48.

In *M'Clelland* v. *Rose* (C. C. A., 5th Circuit, 247 Fed. Rep., 721, at p. 726) Walker, Circuit Judge, says:

"Whether that suit has or has not passed beyond the stage at which individuals who were parties to it only by representation may intervene and claim the right to be heard, such individuals may not avoid the effect upon them of the decree rendered in favor of the appellant by resorting to another jurisdiction for a relitigation of the questions passed on in that suit.

American Steel & Wire Co. v. *Wire Drawers', etc., Union* (C. C.), 90 Fed., 598, 606, 607; *Sharon* v. *Terry* (C. C.), 36 Fed., 337; *Alger* v. *Anderson* (C. C.), 78 Fed., 729, 733; *Cornue* v. *Ingersoll,* 176 Fed., 194."

See also *Cotton* v. *Smith* (144 Missouri Appeal Rep., 169, at p. 173).

FOR THE PURPOSES OF THE PRESENT BILL, THE PROCEEDINGS IN BANKRUPTCY MUST BE TREATED AS IN ALL RESPECTS VALID.

Abbott v. *Anderson,* 184 Ill. App., 598, at pp. 613-614:

"In our opinion this position amounts to a collateral attack on the judgment of the bankruptcy court confirming the composition and is untenable. The bankruptcy court had jurisdiction to enter the order, even admitting for the sake of the argument only, that it may have *erred* in so doing without previously having adjudged the members of the partnership individually bankrupt.

No appeal was taken from that order and, until reversed in a direct proceeding, it is *res adjudicata*" (citing authorities).

Hull v. *Burr,* 206 Fed. Rep., 1, at p. 3.

Hall v. *Ames,* 190 Fed. Rep., 138, at p. 141; S. C., 182 Fed., 1008.

Riverdale Cotton Mills v. *Alabama & G. Mfg. Co.,* 198 U. S., 188, at pp. 197, 198, Brewer, *J.*

In *Matter of Sage* (224 Fed., 525, at p. 532; 35 Am. B. R., 436, at pp. 446-447) Dyer, District Judge, says:

> "In view of the nature of the present proceedings, the court has given very careful consideration to the irregularities just referred to, with a view to determining whether they constitute jurisdictional defects which render the adjudication void, or on the other hand, should be treated as mere errors of procedure, which might have been availed of upon direct review, but are not available collaterally. As the petition in bankruptcy contained all the requisite jurisdictional averments, and as the United States District Court in which it was filed had jurisdiction of the subject-matter, and acquired jurisdiction of the parties by virtue of the filing of the petition and the appearance of the bankrupt, the creditors of the bankrupt not being entitled under the law to any other notice than such as is imparted by the filing of the petition, and as it appears that no party in interest has directly questioned the validity of the order of adjudication, the court has reached the conclusion that this order should be treated as valid and not open to collateral attack in this proceeding" (citing authorities).

In *Re Hecox* (C. C. A., 8th Cir., 164 Fed., 823, at p. 825; 21 Am. B. R., 314, at p. 317) Philbin, District Judge, says:

> "Until avoided in a direct proceeding thereof, that adjudication was binding and conclusive on the bankrupt and creditors, as much so as a judgment *inter partes*, on due hearing in a court of competent jurisdiction. *In re American Brewing Co.*, 112 Fed., 752; *In re Knight* (D. C.), 125 Fed., 35; *In re First National Bank*, 152 Fed., 65."

II.

The settlement, order ratifying it, offer of compromise and order of confirmation discharged Thompson from all liability of whatsoever nature to the defendants for any obligations of the firm of S. H. P. Pell & Co.

The demurrer admits that Thompson was a special partner (*supra*, p. 8), and the proceedings in bankruptcy determined that issue (*supra*, p. 34). But even if he were a general partner (the South Carolina complaint does not specifically allege that he was a general partner—p. 54), Thompson would be released, because:

> The settlement ratified by the Court effectually disposed of his liability to contribute for the payment of firm debts (*supra*, pp. 24, 25);
>
> The decree of confirmation, in view of the settlement, expressly released him (*supra*, p. 24);
>
> The defendants, by failing to object, "assented" to the composition agreement, and having acknowledged the status of debtors, upon the basis of which Thompson effected the settlement, they cannot now change their position, to his disadvantage.

The decree of confirmation, in view of the settlement and its ratification, expressly released Thompson, no matter what his relation to the partnership.

The Circuit Court of Appeals restricted the operation of Thompson's "discharge" to "creditors assenting" to the confirmation of the composition, in view of the condition imposed by the bankrupts in Clause *"First"* of the offer of composition (p. 28, f. 52).

But the recitals of the decree of confirmation show beyond peradventure or contradiction that the Bankruptcy Court did not intend to permit such a contention to be made, because the decree recited that it is based "upon all the papers and proceedings had and on the proceedings in Court * * * including statements made by counsel and by said receiver upon the argument" (p. 93).

The release of Thompson by the Bankruptcy Court is unqualified by any reference to the offer of composition (p. 51, f. 96) dated December 21, 1914, or to "assenting creditors" in confirming the terms of the settlement made by the receivers on January 6, 1915, and sanctioned by the District Court on January 6, 1915, and finally settled by decree of January 25, 1915, upon consideration of those proceedings and "argument and proceedings in open court."

The decree confirming the compromise contained the following:

> *"Ordered, Adjudged and Decreed that it is for the best interests of the estate and of the creditors thereof that the settlement with Robert M. Thompson set forth in said offer of composition and the transfer of the property to him referred to in said offer, shall be made,* * * * and THEREUPON THE SAID ROBERT M. THOMPSON SHALL BE RELIEVED OF ANY FURTHER LIABILITY TO THE SAID RECEIVERS OR TO THE ESTATE BY REASON OF THE ORDER HERETOFORE ENTERED BY THIS COURT DATED JANUARY 6, 1915, OR OTHERWISE * * *" (Complaint, p. 95).

In *Re Swofford Bros. Dry Goods Co.* (180 Fed. Rep., 549, at pp. 556, 557) Van Valkenburgh, District Judge says:

> "In this case the trustee had assets of the bankrupt to dispose of and among them

> were claims against the petitioner Swofford. These claims were civil in their nature. They were the subject of sale, compromise, or adjustment for the benefit of the creditors. Swofford made an offer which was accepted. *Both he and the court are carrying out the terms of their contract. His release from these claims was as much a consideration moving to him as any piece of tangible property purchased from the trustee.*"

THE DEFENDANTS, BY FAILING TO OBJECT, "ASSENTED."

The Bankruptcy Law concludes all creditors who fail to object to the confirmation of the offer of composition where they have notice in due season to appear and object.

The bill avers that McCabe & Company had such notice and the answer and demurrer expressly admit the obligation (Bill, p. 6, sub. 10; Answer, p. 59, sub. 411).

By necessary implication of law and of the operation of the Bankruptcy Law, notice of the proceedings and failure to object constitute "assent" within the meaning of the offer of composition (p. 28, sub. "First"; p. 29, sub. "Ninth").

The bankruptcy decree recites full compliance with the Bankruptcy Law (p. 50).

In *Cowen* v. *Paddock,* 62 Hun, 622 Mem. (reported in full in 17 N. Y. Supp., 387), Mr. Hamilton Odell, the referee, reviews the definitions of *assent,* and sums up by saying:

> "In *Husted* v. *Mathes* (77 N. Y., 390) the Court said that consent may be implied from knowledge, and that in the absence of any objection, silence may be deemed sufficient evidence of assent."

In *Peo.* v. *Dong Pok Yip* (164 Calif., 143, at p. 147) the Court says:

> "'*Consent*' differs very materially from '*Assent.*' The former implies some positive action, and always involves submission. The latter means mere passivity or submission."

The defendants having acknowledged the status of debtors upon the basis of which Thompson effected the settlement, they cannot now change their position, to his disadvantage.

The withdrawal of Thompson's claim of $3,373,082.30 was not made until the defendants had accepted their status of scheduled debtors (p. 6) by paying $261.52 to the receivers in bankruptcy (p. 5). It is not alleged by the plaintiffs in the South Carolina action that Thompson had personal knowledge of the alleged fraud. It is inequitable that defendants should afterward change their position to Thompson's disadvantage.

Innocent parties were held estopped by their conduct in:

Gloucester Bank v. *Salem Bank,* 17 Mass., 32 (cited with approval in *Leather Manufacturers Bank* v. *Morgan,* 117 U. S., 96).

Manufacturers & Traders B'k v. *Hazard,* 30 N. Y., 226.

Continental Nat. Bank v. *N. Bank of the Com. Wealth,* 50 N. Y., 575.

Gilbert v. *Groff,* 28 Hun, 50.

III.

The ancillary jurisdiction invoked exists and should have been exercised.

This principle was recognized and applied in *Eichel* v. *U. S. Fidelity & Guaranty Co.,* 245 U. S., 102, where jurisdiction of a District Court was

established to entertain an ancillary bill in equity dependent upon actions at law already pending in the same court, Mr. Justice Van Devanter saying (p. 104):

> "Plainly the bill was dependent and ancillary and the jurisdiction to entertain it was referable to that invoked and existing in the actions at law out of which it arose" (citing authorities).

The general principles are correctly enunciated in the opinion of the Circuit Court of Appeals (*supra*, p. 19), but they were misapplied.

In the recent case of *St. Louis & San Francisco R. R. Co.* v. *McElvain*, 253 Fed. Rep., 123, D. C., E. D., Mo., the grounds of jurisdiction of dependent suits were enumerated by Sanborn, *J.*, at p. 128, who said (p. 135):

> "The jurisdiction and authority have been conferred, and *the duty has been imposed*, upon the federal courts, as has been demonstrated in the earlier part of this opinion, to sustain dependent suits to prevent the relitigation by subsequent suits in other courts of the issues heard and adjudged by the federal courts in original suits *to protect the rights and titles acquired under their decrees in such suits from attacks*, by suits or otherwise, by those bound by such decrees, when such suits are founded on the theory that the adjudications of the federal courts were illegal or ineffective, and to use their injunctions and writs of assistance to effect this prevention and protection, and they may not lawfully renounce this jurisdiction or disregard this duty."

These petitioners sought to protect the rights and titles acquired by Thompson in virtue of the judicial settlement with him and the release granted to him; he at least should have been so protected (Points I and II above).

Such ancillary jurisdiction exists in the Court as a court of equity, though the order of compromise was in bankruptcy.

> *Dewey* v. *West Fairmont Gas etc. Co.*, 123 U. S., 329.
> *Beach* v. *Macon Grocery Co.*, 116 Fed. R., 143.

See also, *Eichel* v. *U. S. Fidelity & Guaranty Co.*, 245 U. S., 102, where a bill in equity was maintained as dependent upon actions at law in the same court.

The reasoning of the Circuit Court of Appeals was (Opinion, p. 76 *et seq.*) that the suit cannot be regarded as an ancillary suit, because

> "the composition agreement limited the discharge to those who should assent thereto,"

whereas, as we have already shown (*supra,* pp. 22 *et seq.*), *in this suit* Thompson must be treated as a special partner whose complete obligation to and for the firm was determined in and concluded by the proceedings in bankruptcy and he was completely released from all obligations whatsoever and to whomsoever for his relations with the firm, by his contract, approved by the Court, supplemented by the order of confirmation (Exhibit 9, pp. 49-53).

The Circuit Court of Appeals further reasoned that the South Carolina suit was predicated upon an allegation of newly discovered fraud, and that the claim was, therefore, not discharged in bankruptcy, thus ignoring the fact that Thompson's discharge was from all obligation whatsoever (*supra,* p. 24), and that the McCabe firm had first induced Thompson's action by posing as a debtor (*supra,* p. 17) and even after full knowledge of the facts which they alleged, had made no application to the

Bankruptcy Court for any relief to modify the effect of the release.

While the opinion of the Circuit Court of Appeals considers that the bill is without equity, that is an inconclusive view, because they dismissed for want of jurisdiction and not for want of equity. The bill, however, had equity, as we have shown above (pp. 18-19).

In the District Court alleged want of equity is merely predicated upon the view that Thompson could plead the agreement with the receivers as a defense in the South Carolina action (Hand, *D. J.*, pp. 67-68); whereas at an earlier stage Hough, *C. J.* (p. 68), expressed the opinion:

> "But as an endeavor to restrain a defendant who was party or privy to a decree in bankruptcy, there is jurisdiction to entertain suit."

While the Circuit Court of Appeals, overlooking in its opinion the effect of the *contract* with the receivers, construed the composition agreement and order of confirmation as not binding on the defendants and not pleadable in bar even in the South Carolina Court, it dismissed for want of jurisdiction (p. 76) and without prejudice (pp. 76, 77), thus making this expression of opinion a mere ineffectual observation.

A.

The primary jurisdiction of the Bankruptcy Court was adequate to support the ancillary jurisdiction.

Hitherto we have assumed under Points I and II that the bankruptcy proceedings were valid; we shall now demonstrate it.

THE FILING OF THE PETITIONS IN INVOLUNTARY BANKRUPTCY IN THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK BROUGHT THE PROPERTY OF THE BANKRUPTS (*firm* AND INDIVIDUAL), WHEREVER SITUATED, INTO *custodia legis*, AND THAT COURT THUS ACQUIRED THE FULL RIGHT TO PASS ADJUDICATION AND ADMINISTER THE ESTATE.

Lazarus v. *Prentice*, 234 U. S., 263, 266.
Acme Harvester Co. v. *Beekman Lumber Co.*, 222 U. S., 300.
Mueller v. *Nugent*, 184 U. S., 1.
Knauth v. *Latham*, C. C. A., 5th Cir., 219 Fed., 721, at page 722.

THE BANKRUPTCY COURT ACQUIRED JURISDICTION OVER ROBERT M. THOMPSON INDIVIDUALLY BY

(1) The filing of the petitions of November 28, 1914, to have him declared to be a general partner and adjudicated an involuntary bankrupt (Exhibits 1 and 2, pp. 15-24).

Subpoena was issued and served upon Robert M. Thompson (Exhibit 3, pp. 24, 25).

(2) It exercised its jurisdiction by the seizure by and possession of the bankruptcy receivers of property *then* in the bankrupts' possession, which was claimed by Robert M. Thompson, and for the release of which he petitioned the Bankruptcy Court (Bill, pp. 4, 43).

(3) The settlement made with the sanction of the Bankruptcy Court by Robert M. Thompson, the bankruptcy receivers and the firm cred-

itors (majority in amount and number under the Bankruptcy Law) and the express stipulation of Robert M. Thompson to abide by and carry out the orders of the Bankruptcy Court (Bill, pp. 5-7, 42-49).

Since the proceedings in the Bankruptcy Court terminated in a decree which released Thompson from his obligations to and for the firm (*supra*, p. 24), and which discharged firm debts, that decree cannot be disregarded by the McCabe firm nor collaterally attacked by them, and the Court which rendered it should not suffer it to be disregarded by the South Carolina suit.

In *Re Samuels* (C. C. A., 2nd Cir., 215 Fed. Rep., 845, at p. 849) Rogers, Circuit Judge, said:

> "If under such circumstances the bankruptcy court has no right to inquire and determine whether one who is alleged to be a secret partner of the firm against which bankruptcy proceedings are pending, is or is not a member of the firm, and, if he is, whether he is solvent, then certainly the court is left in an anomalous and even an extraordinary situation. *That it is possessed and must be possessed of such power we cannot doubt.*"

See also:

> *Armstrong* v. *Fisher*, 224 Fed., 97, 99, 139 (C. C. A., 8th Cir.).
>
> *Ft. Pitt Coal & Coke Co.* v. *Diser* (C. C. A., 6th Cir., 239 Fed. Rep., 443, at p. 447).

The Bankruptcy Court acquired power to adjudicate Thompson's rights, and liabilities to and the rights of the firm creditors against him.

> *In re Howard Co.*, C. C. A., 2nd Cir., 203 Fed., 445, 448.

He was in fact and law made a party to the bankruptcy proceedings by the involuntary petitions, by the proceeding instituted by him in the Bankruptcy Court for the delivery to him of bonds and stocks *in the possession* of the bankruptcy receivers, and by his agreement with the creditors and the receivers and his express stipulation made in open court to abide by and perform the terms of the composition and hold himself amenable to the order of the Bankruptcy Court.

In re Swofford etc. Co., 180 Fed. Rep., 549.

After he acquiesced in and performed the judgment of the Bankruptcy Court, it is not permissible for third parties to assert lack of jurisdiction over him.

Re Hollingsworth etc. Co., C. C. A., 1st Circuit, 242 Fed. R., 753, 756.
Armstrong v. *Norris*, 247 Fed. Rep., 253. C. C. A., 8th Circuit.

THE BANKRUPTCY COURT ACQUIRED AND RETAINED JURISDICTION OF THE FIRM CREDITORS OF S. H. P. PELL & CO. BY THE ADJUDICATION.

The creditor must either resist the adjudication or, having passively acquiesced in that result, be bound by the orders made by the Bankruptcy Court in the course of administration. The McCabe firm, it will be remembered (Bill, p. 5), had actual knowledge.

THE BANKRUPTCY COURT WAS VESTED WITH PLENARY POWER TO MAKE THE DECREE OF JANUARY 25, 1915.

1. "To *determine the controversy*" between the bankrupts' estate and the firm creditors of

S. H. P. Pell & Co. with Robert M. Thompson and to release him upon performance of the determination, whether attained through compromise or final determination of the controversy.

2. To *"cause the estate to be collected and reduced to money"* and compromise the conflicting claims between the bankrupt estate and the firm creditors with Robert M. Thompson and thereupon by its decree to release and discharge Robert M. Thompson from any further liability to the bankrupt estate and the firm creditors.

3. To *confirm the composition* between the creditors and the firm (as an entity) and the members thereof and in accordance with its stipulation thereby release and discharge Robert M. Thompson from all individual and other liability as a partner dormant or otherwise unknown to the creditors.

4. To conclusively bind the firm creditors as well as immediate parties to the bankruptcy proceeding by its decree and make that decree invulnerable against collateral attack.

THE BROAD GRANT OF JURISDICTION IS CONTAINED IN THE BANKRUPTCY LAW.

The Bankruptcy Law provides:

> "Section 2 provides that the courts of bankruptcy shall have power and authority to
>
> * * * * * *
>
> "(7) 'cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided,
>
> * * * * * *
>
> "(15) 'make such orders, issue such process, and enter such judgments in addition

to those specifically provided for as may be necessary for the enforcement of the provisions of this act.'"

Section 2 further provides and concludes:

"Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Section 27*a* provides:

"The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate."

Section 47*a* (2) provides that trustees shall

"collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest."

General Order 28 provides that:

"Whenever it may be deemed for the benefit of the estate of a bankrupt * * * to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee * * * may file his petition therefor, and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee."

In *Re Siegel-Hillman Dry Goods Co.* (D. C., Mo., 111 Fed. Rep., 980, at p. 986) Shiras, District Judge, says:

> "That in cases wherein a court of equity is charged with the distribution of an estate or a fund under its control, and has before it the several parties whose rights and interests are involved in the administration of the estate, it may, disregarding mere matters of form, *but having regard to the substantial rights of all the parties, ascertain the ultimate relation and liability of the several parties, and base its decree thereon, thus avoiding the delay and expense which would be caused if the parties were remitted to the pursuit of their legal rights without aid from a court of equity.*
>
> Cases in bankruptcy, such as that now before the court, are peculiarly within this rule, and call for the exercise of the full powers of the court for the ascertainment and proper enforcement of the equities of the parties; for in no other proceeding can these equities be so well determined and protected as in the bankruptcy proceedings, wherein the court is called upon to enforce the provisions of the act, which provisions largely control the rights of the parties."

A controversy was presented in the Bankruptcy Court as to the liability of Thompson to the creditors of the estate of S. H. P. Pell & Co. upon the creditors' claim that he was a general partner in the bankrupt firm of S. H. P. Pell & Co. against Thompson's contention to the contrary, and that he was a creditor to the extent of $3,373,082.20 (Petition, p. 43, f. 78).

Under Sections 2, 27*a* and 47*a* of the Bankruptcy Law (*ante*, pp. 63, 64) and General Order XXVIII, the Bankruptcy Court had the general power to *entertain* and compromise any controversy arising in the administration of the estate.

Under Section 27*a* of the Bankruptcy Law the Court has the general power to compromise any controversy arising in the administration of the estate.

The power to compromise is further extended by General Order XXVIII, so that it seems beyond question that the Bankruptcy Court had the power to authorize its receivers to enter into an agreement of compromise and settlement with Thompson, which seemed to be for the best interests of the bankrupt estate (p. 51).

(See Section 2, Subs. (7), (15), Bankruptcy Law.)

The Bankruptcy Court had full power to determine the extent of Thompson's liability to the firm and its creditors, and it did so, and discharged him from any further liability than that imposed by its decree; and as the McCabes and Thompson were each parties before the Court or represented by receivers, that decree is conclusive and may not be attacked collaterally.

The failure to appoint a trustee (Bankruptcy Law, Secs. 47, 27) or to give a particular notice (*vide*, Sec. 54, General Order VIII), etc., does not oust the jurisdiction of the District Court acquired by the filing of the petitions in the form required by the statute.

But this matter is fully covered by the fact that in this case the Bankruptcy Court had full jurisdiction of the subject-matter and of the person, and made a decree, and therefore, however irregular or erroneous its procedure in making its decree may have been, the decree is not subject to collateral attack.

B.

The Court's ancillary jurisdiction of the Bill of Peace praying for injunctive relief.

THE POWER AND JURISDICTION OF THE COURT TO SUSTAIN A BILL PROTECTING PARTIES TO ITS DECREE FROM VEXATIOUS, BASELESS, HARASSING LITIGATION ATTACKING THE TITLE AND QUIETING THE PARTY IN THE ENJOYMENT OF THE RIGHTS VESTED BY FORCE OF THE DECREE IS BEYOND QUESTION.

Thompson v. *Emmett Irr. Dist.*, 227 Fed. Rep., 560, at p. 564.
Riverdale Mills v. *Alabama etc. Mfg. Co.*, 198 U. S., 188, 195.
Sharon v. *Tucker*, 144 U. S., 533.
Ritchie v. *Dorland*, 6 Calif., 33, 37-38.
Orton v. *Smith*, 59 U. S., 263.

THE FEDERAL COURT OF EQUITY HAS POWER IN A CASE OF THIS CHARACTER TO ISSUE THE INJUNCTION RESTRAINING THE ACTION AT LAW, NOTWITHSTANDING SECTION 720 OF THE UNITED STATES REVISED STATUTES.

Gunther v. *Atlantic Lines*, 200 U. S., 273, 292.
Julian v. *Central Trust Co.*, 193 U. S., 93, 112.
Riverdale Mills v. *Mfg. Co.*, 198 U. S., 188, 196-197.

In *Dietzsch* v. *Huidekoper* (103 U. S., 494, at p. 497) Mr. Justice Woods says:

> "A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State Court.
>
> * * * * * *

> As the bill in this case is filed for the purpose of giving to litigants on the law side of the court the substantial fruits of a judgment rendered in their favor, it is merely auxiliary to the suit at law, and the court has the right to enforce the judgment against the party defendant and those whom he represents, no matter how or when they may attempt to evade it or escape its effect, unless by a direct proceeding. These views are sustained by the case of *French, Trustee,* v. *Hay,* 22 Wall., 250 (89 U. S. XXI, 857), between which and this case there is no substantial difference."

The Bankruptcy Law does not attempt to restrict the general equity jurisdiction of the District Court. Section 11a merely grants a power to stay *pendente lite* and is a power in *addition* to the general equity power of a court to restrain interference with its own decrees.

In *Riverdale Co.* v. *Alabama etc. Co.* (198 U. S., 188) Mr. Justice Brewer (at p. 195) says:

> "In other words, a Federal court, exercising a jurisdiction apparently belonging to it, may thereafter, by ancillary suit, inquire whether that jurisdiction in fact existed.
>
> *It may protect the title which it has decreed as against every one a party to the original suit and prevent that party from relitigating the questions of right which have already been determined. French* v. *Hay,* 22 Wall., 250; *Cole* v. *Cunningham,* 133 U. S., 107; *Root* v. *Woolworth,* 150 U. S., 401. In this case, on page 410, it was said:
>
> *"'It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees and judgments, which remain unreversed, when the subject-matter and the parties are the same in both proceedings.'*
>
> * * * * * *

> "The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to avoid the relitigation of questions once settled between the same parties is well settled. *Story, Eq. Jur.*, Sec. 959; *Kershaw* v. *Thompson*, 4 Johns. Ch., 609, 612; *Schenck* v. *Conover*, 13 N. J. Eq., 220, 78 Am. Dec., 95; *Buffum's Case*, 13 N. H., 14; *Shepherd* v. *Towgood*, Turn. & R., 379; *Davis* v. *Black*, 6 Beav., 393. In *Kershaw* v. *Thompson* the authorities are fully reviewed by Chancellor Kent, and need not be re-examined here."

In *Riggs* v. *Johnson County* (6 Wall., 166, at p. 187) it was held that:

> "Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purpose for which it was conferred by the Constitution."

See also:

Lamb v. *Ewing*, 54 Fed., 269.

THE PRESENT SUIT IS NOT DEPENDENT UPON THE DIVERSITY OF CITIZENSHIP OF THE PARTIES, BUT PROCEEDS IN EXECUTION AND ENFORCEMENT OF (AS ANCILLARY TO AND DEPENDENT UPON) THE EXISTING DECREE.

McCabe v. *Guaranty Trust Co.* (C. C. A., 2nd Cir.), 243 Fed. Rep., 845.

See Opinion of Hough, *C. J.* (Record, p. 68).

In *Wabash R. Co.* v. *Adelbert College* (208 U. S., 38, at p. 54) Mr. Justice Moody says:

> "In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy."

See also as additional illustrations of the extent and nature of ancillary jurisdiction:

Julian v. *Central Trust Co.*, 193 U. S., 93, at pp. 113-114.

Brun v. *Mann*, 151 Fed. Rep., 145, at p. 150.

Hatcher v. *H. & B. Co.* (C. C. A., 8th Cir.), 133 Fed. Rep., 267, at pp. 269-270.

In *Sherman Nat. Bank* v. *Shubert Co.* (C. C. A., 2nd Cir., 247 Fed. Rep., 256, at pp. 258-259) Ward, Circuit Judge, says:

> "But it is filed, among other things, to stay the action at law, and so is connected with and ancillary to it. The jurisdiction of this court over the action at law by virtue of the citizenship of the parties extends to the ancillary bill. *Minnesota Co.* v. *Soutter*, 2 Wall., 609; *Krippendorf* v. *Hyde*, 110 U. S., at p. 284."

JURISDICTION TO ENFORCE THE ORIGINAL DECREE CONTINUES, NOTWITHSTANDING THE SUBJECT OR *res* OF THE FORMER SUIT MAY HAVE PASSED OUT OF THE POSSESSION OF THE COURT IN THE PERFORMANCE OF ITS DECREE.

Wabash R. Co. v. *Adelbert College*, 208 U. S., 38, at pp. 56-57.

Simon v. *So. R. Co.*, 236 U. S., 115, at pp. 124, 125.

Riverdale Mills v. *A. & G. Mfg. Co.*, 198 U. S., 188, at pp. 195, 196.

JURISDICTION IS NOT EXHAUSTED BY THE RENDITION OF THE DECREE AND THE PERFORMANCE OF ITS MANDATE, BUT CONTINUES AND MAY BE INVOKED WHENEVER THE RIGHTS THEREBY CONFERRED ARE ASSAILED.

In *Central Nat. Bank* v. *Stevens* (169 U. S., 432, at pp. 464-465) Mr. Justice Shiras says:

> "But it has been frequently determined by this court that the jurisdiction of a court *is not exhausted by the rendition of the judgment,* but *continues until the judgment shall be satisfied.* Thus it was said in *Riggs* v. *Johnson County* (*United States, Riggs* v. *Johnson County Supers.*), 73 U. S., 6 Wall., 166, that 'process subsequent to judgment is an essential to jurisdiction as process antecedent, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.'
>
> And in *Amy* v. *Supervisors* (*Amy* v. *Barkholder*), 78 U. S., 11 Wall., 136, it was said: 'The two sets of tribunals—state and national—are as independent as they are separate. Neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees.'
>
> 'An execution is the end of the law. It gives the successful party the fruits of his judgment.' *United States* v. *Nourse,* 34 U. S., 9 Pet., 28. But it is scarcely necessary to quote authorities to show that to deprive a court of the power to execute its decrees is to essentially impair its jurisdiction *'Juris effectus in executione consistit.'* Co. Litt., 289."

See also:

Phelps v. *M. R. F. L. Ass'n,* 112 Fed. Rep., 453, at p. 458.

IT IS NO DEFENSE TO THE BILL THAT THE PLAINTIFFS HAVE AN ADEQUATE REMEDY AT LAW.

In *Gunter* v. *Atlantic Coast Line R. Co.* (200 U. S., 273, at pp. 278-279) Mr. Chief Justice White says:

> "Jurisdiction of the court in equity was challenged on the ground that there was an adequate remedy at law. A final decree passed in favor of the complainant, recognizing the alleged exemption, and perpetuating the injunction. An appeal was prosecuted to this court. The cause was decided at the December term, 1872. It was held that there was a contract of exemption, which would be impaired by enforcing the taxes complained of, and hence the decree below was affirmed. *Humphrey* v. *Pegues*, 16 Wall., 244."

At page 283 Mr. Chief Justice White says:

> "*First.* We at once treat as undoubted the right of the Atlantic Coast Line Railroad Company to the benefits of the decree in the Pegues Case, since it is conceded in the argument at bar that that company, as the successor to the rights of Pegues, is entitled to the protection of the original decree rendered in his favor."

At pages 292, 293, Mr. Chief Justice White says:

> "*And this reasoning disposes of the contention that the court below erred in enforcing its prior decree because there was adequate remedy at law, by interposing a defense in the state courts to the actions brought by the attorney general. That question was foreclosed by the decree in the Pegues case.* * * * Having acquired by that

decree a right which the petitioner was entitled to enforce, whatever might have been the rule of tender as applied to other cases, that rule could not rightly be invoked to deprive the court below, as a court of equity, of the power to protect the petitioner in the enjoyment of rights previously secured under a decree of the court."

See also:

Hamilton v. *Alabama Power Co.*, 70 So. Rep., 737, at p. 737; 195 Ala., 438.
Foltz v. *St. Louis & S. F. Ry. Co.*, 60 Fed. Rep., 316, at p. 322.

The bill was not without equity (supra, pp. 18-19), and the excuses and attempt to differentiate the South Carolina suit are without merit.

The decrees below should be reversed, and the questions of law having been determined in favor of the petitioners, no issue of fact will be of legal importance, and judgment absolute should be directed for these petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 311.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON,
Petitioners,

against

W. GORDON McCABE, JR., and WILLIAM F. GRAY,
Respondents.

UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONERS' REPLY BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON, Petitioners, against W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Respondents.	No. 311.

REPLY BRIEF FOR PETITIONERS.

The brief of the respondents enables us to attack by way of reply some of the misapprehensions upon which the respondents' position is necessarily based.

1. It assumes that the decree releasing Thompson from liability must be and is limited by the terms of the offer of composition and cannot, though it be a separate and independent subject, be treated as though it were also in an independent decree.

2. It assumes that this release operated only like a discharge in bankruptcy and consequently can only be pleaded as a defense.

3. It assumes that, while conceding by demurrer that Thompson was a special partner, the respondents can escape the legal effect of such special partnership as to his liabilities.

4. It assumes that the petitioners have an inadequate grasp of the situation, in that respondents assert that the South Carolina action is not an attempt to enforce any liability of Thompson as a debtor to the firm or estate of Pell & Co., but an individual liability as partner.

We meet these assumptions by squarely taking issue with them:

I. The decree releasing Thompson was not limited by the offer of composition, but as an act of complete justice to him, released the only liability which as special partner he could be under, and thus destroyed all liability which as partner he could be under to anyone claiming against him a liability for firm transactions. This liability, whatever it was and however it accrued, passed to the receivers and was vested in the bankrupt estate. In his settlement with the firm's receivers and the release of liability to the receivers and the firm's estate he secured complete immunity from further liability for firm debts, because he discharged all liability for firm debts by discharging all debt to the firm.

II. This release was not a discharge in bankruptcy, nor do we contend that it was; it was a discharge of all claim that he was indebted to the

firm; and, being a discharge of all possible debt to the firm, it bound everyone who could claim that he was a firm debtor by discharging his liability to the firm's creditors who were represented by the receivers in the Bankruptcy Court. No one could hold him liable for a debt of the firm except as a firm debtor, because he is admitted by the demurrer to have been a special partner; and the respondents do not bring themselves in any way within the category of persons entitled to take advantage of the liabilities of a special partner to firm creditors, expressly imposed by Section 34 of the New York Partnership Law (Respondents' Brief, p. 38), in that they do not in any way show or even contend, so far as we are advised (and certainly it is not disclosed by the record), that any fact raising the statutory liability exists or ever existed. The South Carolina suit is not based upon that statutory liability, and the demurrer *does* concede that Thompson was a special partner.

Of course, we emphasize, and even "harp upon" this, because it is a legal factor in the case; how can one discuss a demurrer and its legal adequacy if one does not consider what allegations it concedes? The allegation of special partnership is an allegation of fact, not a conclusion of law; though it is a fact which is the effect of law.

III. Thompson is conceded to have been a special partner; that being so, his legal liability is that of a special partner only; such a partner is not liable for the debts of the partnership beyond the fund contributed to the capital (New York Partnership Law, Sec. 36—quoted in Petitioners' Main Brief, p. 22). Respondents (Brief, p. 38) have shown that under given circumstances there

may be a liability as a general partner; but the given circumstances do not exist in this record; and the South Carolina suit was not brought on any theory of liability imposed in these exceptional circumstances.

IV. Our grasp of the situation is adequate. The South Carolina action is an attempt to hold Thompson liable for the obligations of the firm; his only liability for such obligations having been prescribed by the Partnership Law of New York, when he received a release from his obligations to the estate and its receivers, and all of the assets of the firm were directed to be conveyed to a trustee (Record, p. 50) for administration (p. 52), it was unquestionably the legal effect of the decree that all firm assets should be so transferred and that no further claim against Thompson was a bankruptcy asset, and consequently that no further liability could be asserted against Thompson, by reason of his liability as a partner.

We recur to proposition I above (p. 2). There was a just and equitable reason why the decree should not be limited by the offer of composition. The offer was embodied in the decree and made a part of it (Record, p. 50), but *only* a *part*.

The recitals of the order expressly read: "Upon all the pleadings and proceedings heretofore had, including the statements made by the receiver and counsel upon the argument and due consideration having been given thereto" (p. 50, fol. 93).

The embodiment of the offer was sufficient to carry the offer into effect, but as to Thompson the decree went further and stated additional legal consequences.

Under the offer it was part of the consideration (p. 28) that Thompson should be released from all liability to the firm and so long as his only liability was that of special partner, not violating the provisions of Section 34 of the Partnership Law, this release would wipe out all liability to creditors of the firm by reason of the *partnership*, because it would wipe out his only obligation as a special partner, and to that no assent of any creditor (beyond the statutory assent in number and amount) was in any wise necessary; but there might possibly be liabilities not arising from the *partnership* at all, which the performance of his obligations as partner might not acquit; these were possible liabilities arising from *transactions*. Thompson's *transactions* or his interest in transactions cover pages of the documents annexed to the composition agreement (pp. 30, 38-41); they resulted in his being scheduled as a creditor for $3,373,082.30 (p. 27). The legal effect of those *transactions* was entirely apart from his liabilities as a partner; no assent to the release from his liability to the firm was required by the terms of the offer of composition, that was to be self-operative upon confirmation, but to effect a release also of *any* and *all* liability to *any* creditor of S. H. P. Pell & Co.,

> "on account of *any* connection of said Robert M. Thompson with said firm or any *transaction* of said Robert M. Thompson by or through said firm" (p. 28),

the assent of such creditor was required. Neither the offer nor the decree attempted to ascertain whether or when there was such individual liability of Thompson to a creditor on account of the causes specified.

So also (Ninth, p. 29), the second reference to an assent was a statement of the effect of such assent when given, it was to be deemed conclusively to have released Thompson

> "of and from any and all liability to *such* creditor *on account* of *any* connection of said Robert M. Thompson with S. H. P. Pell & Co., or any *transaction* of said Robert M. Thompson by or through S. H. P. Pell & Co."

Neither this provision for an assent to a release of individual liability to creditors, nor for the construction of an assent when given, was intended to create a liability where none existed, nor to limit the effect of a release of Thompson's obligations to the firm, its receivers or its estate. This latter release was to be given at all events (if the statutory assent in number and amount could be procured) and no other assent of individual creditors was required. If the legal effect of this release was to extinguish a claim of a creditor against Thompson as *partner,* the offer did not save it; the offer only provided for an additional release, to wit, by an assenting creditor, of such liability to him as would survive a release of Thompson's liability to the firm, its receivers or estate.

But in the present case, because Thompson is assailed only as a *partner,* and it is admitted that he is a special partner, the release contemplated by the offer, without the assent of any particular creditor, would be effective to extinguish the respondents' claim in the South Carolina suit.

So that the offer never contemplated the restriction of the legal effect of this release; it provided for this release regardless of the assent of any

particular creditor, and it did not limit its effect to assenting creditors.

And, accordingly, though the decree embodied the offer as a *part,* and thus carried it into effect with just such restrictions as it contemplated, it carried out the unrestricted part of the offer by granting the very release which it provided for, a complete release of Thompson, upon compliance by him,

> "of any further liability to the said receivers or to the estate by reason of the order heretofore entered by this Court dated January 6, 1915, or *otherwise.*"

This release was effective without assent; and its legal effect was to destroy any claim of any creditor based upon the existence of the partnership. If the claim was based upon any other act of Thompson, the confirmation and embodiment of the offer of composition took care of that, and released liability to assenting creditors; but if the claim arose from the *partnership,* then assent was wholly immaterial. The debt to the partnership being released, all liability to anyone claiming by reason of the partnership *ipso facto* ceased.

Respondents concede that the Court has jurisdiction of an ancillary suit (Brief, p. 10). We have never contended for any jurisdiction but an ancillary jurisdiction. This Court has considered an ancillary suit as a continuation of the original litigation.

> *Minnesota Co.* v. *St. Paul Co.,* 2 Wall., at p. 633.
>
> (See our brief in opposition to motion to dismiss the appeal in Case No. 335, October Term, 1919, at pp. 11, 12.)

So that we merely have to consider whether this is an ancillary suit; and since it is also conceded (Respondents' Brief, p. 33) that on a writ of certiorari the whole record is here for review, the question of merits as well as jurisdiction is before the Court on this review.

The two questions are adequately argued in our principal brief. But we have been enabled in this reply to bring out more clearly that the Circuit Court of Appeals erred when it considered that the whole effect of the decree confirming the composition was limited to assenting creditors (p. 75). The Court in its opinion absolutely failed to give any effect whatsoever to the specific purpose for which the assent was required and also to the provision immediately preceding (p. 28), for a release for which no assent was required (*supra*, p. 5). It is his rights under the first provision for release that Thompson insists are invaded by respondents' suit; and this contention the Circuit Court of Appeals overlooked.

We do not need to question the proposition that a discharge in bankruptcy can be pleaded as a defense in a suit at law, and therefore that a suit in equity is not ordinarily necessary. We do not concede that the prosecution of the suit at law could never be enjoined; that would depend upon whether equitable reasons could be shown.

In the first place, Thompson's release was not a discharge in bankruptcy and is not urged as such; in the second place, an equitable reason why the South Carolina suit should not be suffered to proceed is shown. The suit is confessedly vexatious; the facts which make it vexatious are pleaded (pp. 11-13) and the demurrer admits them.

Equity will enjoin a suit at law intended merely to harass or annoy or take unconscionable advantage of a defendant, especially where it is prosecuted in a distant forum to make the defense more difficult.

This is a suit in equity and equitable principles should prevail.

The jurisdiction invoked is ancillary, but the power invoked is the equity power.

This case is distinguishable from *Abendroth* v. *Van Dolsen,* 131 U. S., 66. That was a case in which a special partner could not avail himself of a discharge granted to the general partners in bankruptcy to escape liability imposed upon him as a general partner for violation of the terms of the Special Partnership Law; in the present case Thompson seeks to secure the benefit of a release expressly granted to himself in the bankruptcy proceeding, to which he was a party by petition and subpoena and participation, a situation actually distinguished in the *Abendroth* case (p. 71).

In the *Abendroth* case it is said (p. 71):

> "With regard to the *estate* of the bankrupt debtor, which has been by the court's warrant of seizure, or by the surrender of the debtor, brought within the possession and jurisdiction of the Court, its orders, decrees and judgments as to the right and title to the property, or as to the disposition of it among the parties interested, are binding upon all persons and in every court."

Thompson's liability under the Partnership Law (if any) was an asset of the estate and governed by the decree; any claim of liability by reason of

any statutory penalty imposed by the Partnership Law is wholly without any foundation in this record.

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STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWARD H. PELL and ROBERT M. THOMPSON,
Plaintiffs-Petitioners,

versus

W. GORDON MCCABE, JR., and WILLIAM F. GRAY,
Defendants-Respondents.

BRIEF FOR RESPONDENTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

(No. 311)

STEPHEN H. P. PELL, Charles A. Kittle, Howland H. Pell and Robert M. Thompson,
Plaintiffs-Petitioners,

against

W. GORDON MCCABE, JR., and William F. Gray,
Defendants-Respondents.

BRIEF FOR RESPONDENTS.

Statement.

The petitioners apply to this Court to review a decision of the Circuit Court of Appeals for the Second Circuit, which affirmed a decree of the District Court for the Southern District of New York, dismissing the bill of complaint of the plaintiffs, the petitioners herein, with a slight modification, viz., that the decree is to be modified to provide

"that the dismissal is without prejudice" (Rec. p. 76). It did not, as stated in petitioner's brief (pp. 2, 12) modify the decree below by dismissing for want of jurisdiction (see p. 9 post).

Questions Involved.

The questions involved are, in substance: (1) whether a district court which granted a discharge to bankrupts will enjoin actions against them in all other courts or will leave them to their remedy to set up their discharge as a bar in the court where the suit is brought, (2) whether one who is liable as a general partner can be discharged or released from liability to his creditors by a bankruptcy court in a proceeding not authorized by the bankruptcy act; and (3) whether the District Court for the Southern District of New York attempted to make such an order.

Facts.

The facts as stated in petitioner's brief are so incomplete and confused with argument that we believe it will aid the Court to here make a concise statement of the facts as we understand them to be.

This Suit.

This suit is brought by plaintiffs for the purpose of perpetually enjoining these defendants from:

1. Further proceeding in the action now pending in the United States District Court for the Eastern District of South Carolina so far as it proceeds against Robert M. Thompson on the ground that he is liable as a general partner of S. H. Pell & Co., upon any claim which was provable in bankruptcy (p. 13).

2. From continuing the said action in South Carolina or instituting any other action upon transactions between defendants and plaintiffs (Pell & Co.) or upon the plaintiffs (Pell & Co.) fraud in said dealings which was not at the time known to defendants (pp. 13, 4, 9).

3. From attacking, questioning or challenging the power and jurisdiction of the United States District Court for the Southern District of New York to make certain orders mentioned in the complaint and the effect and extent of said orders (p. 14).

PARTIES.

The plaintiffs herein were members of the firm of S. H. P. Pell & Co., Robert M. Thompson claiming to be a special partner; and the defendants are residents of South Carolina who had transactions with that firm prior to December 23, 1913, wherein they employed said firm to buy and sell cotton on the New York Cotton Exchange (pp. 3-4).

Neither the plaintiffs nor the defendants herein reside within the Southern District of New York

within the requirements of the Judicial Code (pp. 3-4). So that the only basis for jurisdiction in the District Court is that this suit is anciliary to bankruptcy proceedings heretofore had therein.

ACTION IN SOUTH CAROLINA SOUGHT TO BE ENJOINED.

The action now pending in the United States District Court for the Eastern District of South Carolina against these defendants was commenced on or about March 25, 1918, by the service of a summons, personally, upon Robert M. Thompson, one of the plaintiffs herein and one of the defendants in that action (p. 11, fol. 19; p. 12, fol. 21); said action is for the recovery of moneys obtained from the plaintiffs (the defendants herein) by the defendants (the plaintiffs herein) by fraud and deceit (pp. 54-56). Said action was commenced in the Court of Common Pleas in the State of South Carolina and was removed by the defendants (the plaintiffs herein) into the United States District Court for the Eastern District of South Carolina where it is now pending (p. 12).

Plaintiffs-appellants contend that by reason of the proceedings had in the United States District Court for the Southern District of New York in the bankruptcy proceedings of S. H. P. Pell & Co., these defendants cannot maintain an action in South Carolina or anywhere against these plaintiffs and should be enjoined from doing so. The facts with reference to those bankruptcy proceedings are briefly as follows:

PELL BANKRUPTCY.

On August 3, 1914, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York against Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, individually and as members of the firm of S. H. P. Pell & Co. (p. 4), and said Pell, Kittle and Pell were thereafter adjudicated bankrupts on November 25, 1914 (p. 6), receivers in bankruptcy in the meantime having been appointed (p. 4). Two intervening or supplementary petitions were filed on November 23, 1914, and November 28, 1914, respectively, by certain creditors having claims against the firm of S. H. P. Pell & Co., *alleging that Robert M. Thompson was a general partner* in the said firm of S. H. P. Pell & Co. and demanding that he also be adjudicated bankrupt (p. 5). Thereafter a composition was offered to their creditors by said bankrupts, Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, individually and as members of the firm of S. H. P. Pell & Co., which offer also provided that in addition to the discharge of said bankrupts from all their debts, both individual and partnership, the said Robert M. Thompson should be released from liability to any creditor of S. H. P. Pell & Co. "who shall assent to this offer" (pp. 6, 28-29). Said offer was accepted by the majority of the creditors of said bankrupts and was confirmed by order of the United States District Court (pp. 7, 49-53). Said Robert M. Thompson claimed to be a creditor of said firm and claimed a large amount of securities

of which the receivers had taken possession (p. 5). The receivers with the permission of the District Court compromised said claim with said Thompson and an order thereon was entered (pp. 48-49).

It was also provided in said offer of composition, and the order confirming same that the intervening or supplementary petitions should be dismissed without costs (pp. 31, 52).

ACTION IN NEW YORK AGAINST DEFENDANTS.

In June, 1916, an action was commenced in the State Court of New York by the Guaranty Trust Company of New York against these defendants (p. 9). The Guaranty Trust Company as such plaintiff was acting on behalf and in the interest of Robert M. Thompson, S. H. P. Pell and Charles A. Kittle, three of the plaintiffs herein (p. 9, fol. 15). That action was based on transactions between Pell & Co. and these defendants. A second action was commenced against these defendants in March, 1917, by the same plaintiff in said capacity on alleged claims assigned to Pell & Co. and by Pell & Co. assigned to said plaintiff (p. 10). The defendants set up as a defense to those actions substantially the same facts as are the basis for the action now pending in South Carolina and here sought to be enjoined (p. 11), but defendants asked no affirmative relief there because the plaintiff, Guaranty Trust Co., was suing as assignee of S. H. P. Pell & Co. (pp. 8-9). These defendants removed said actions into the United States District Court for the Southern District of New York, but

the plaintiff objected to the removal and objected to said Court taking jurisdiction, and succeeded in having said actions remanded to the State Court (pp. 9, 10).

Issue.

The issue raised below and decided by the decree appealed from is that plaintiffs have not in or by their said complaint made or stated such a case as entitles them in a court of equity to any discovery or relief, and that it appears from the complaint that the U. S. District Court for the Southern District of New York has no jurisdiction of the parties or the subject matter of this suit either as an original action or as an ancillary suit, and that it appears on the face of the complaint that no cause of action exists in favor of these plaintiffs for the relief prayed for, or for any relief from said Court (p. 64).

Motion for Preliminary Injunction.

While we contend that what occurred on that motion has nothing to do with the question before this Court, the petitioners' counsel seem to think that they derive some benefit from the opinion of Judge Hough on that motion. We shall, therefore, make this brief statement of facts with reference to that motion. The motion for preliminary injunction came on before Judge Hough and was granted by him because in his opinion he could not consider the merits of the application. He, therefore continued the injunction and set the cause for

hearing on a day certain at the head of the Equity Calendar for that day upon the following condition:

> "If before that time defendants appear and answer, or make such motion as may be equivalent to a demurrer, saving their rights to the jurisdictional question sought to be raised under special appearance" (p. 68).

Defendants did before the time specified put in an answer containing a demurrer and then moved for judgment on the pleadings; and after a full hearing upon said demurrer, the District Court dismissed the complaint.

The Decision of the District Court.

The decree of the District Court does not show upon what grounds the dismissal was granted, but provides simply as follows:

> "Ordered, adjudged and decreed that the complaint herein be and the same hereby is dismissed, with costs to the defendants to be taxed."

And the modification directed in the decision of the Circuit Court of Appeals simply adds "that the dismissal is without prejudice," whatever that may mean. But, a reference to the opinion of the District Court shows that the learned District Judge considered the matter fully, both on the question of jurisdiction and on the merits. He refrained from deciding, "whether this bill is within the ancillary jurisdiction of a Court of Bankruptcy or of the

District Court as ancillary to the Court of Bankruptcy" (p. 66, fol. 125); and based his decision on the ground that "even if all be true that the plaintiffs allege," there is no ground for equitable intervention and the bill is without equity (p. 68).

DECISION OF THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals considered both the question of jurisdiction and the merits. It says:

> "The Court below found in the bill no ground for equitable intervention, even if all the allegations in the bill contained be assumed as true. We are in full agreement with that court in believing that the bill is without equity. It was properly dismissed" (p. 76).

The Court then added the following language:

> "And being dismissed for want of jurisdiction the decree is to be modified to provide that the dismissal is without prejudice."

Just what this addition means is beyond our comprehension. But, it will be noticed that it *does not* direct a modification of the decree below so as to provide for a *dismissal for want of jurisdiction.*

There are several inaccuracies in the facts stated in the opinion of the Circuit Court of Appeals. One of the more important being at page 72, where by inadvertence there is omitted from the end of paragraph "First" the condition "who shall assent hereto."

POINTS.

I.

The said District Court has no jurisdiction of this suit or of the parties hereto unless it be as a suit ancillary to the proceedings heretofore had in said Court in the matter of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, Bankrupts.

As an Original Action.

It was admitted by plaintiffs that the Court below has no jurisdiction of a suit between the parties hereto as an original action (p. 68). But, that is necessarily so under the Judicial Code, and it was so held with respect to the very same parties (except Thompson) in the matter of *Guarantee Trust Company vs. McCabe* (250 Fed. R., 699), in which writ of certiorari was denied by this Court, for while the citizenship of the parties does not appear in the bill, it does appear that neither plaintiffs nor defendants are residents of the district in which the suit is brought (pp. 3-4).

As a Suit to Enjoin an Action on a Discharged Debt.

We do not understand that it is specifically contended by plaintiffs that the District Court would have jurisdiction of a suit to enjoin an action in some other court on a debt which was claimed to be barred by a discharge in bankruptcy granted by

said District Court, or the confirmation of a composition and yet that is in substance their contention.

The proper forum to determine whether the debt is one that was discharged is the Court where the action on the debt is pending. Judge HOUGH, in his opinion on motion for temporary injunction in this suit said (p. 68):

> "As an endeavor to stay a suit against a discharged bankrupt it is also not sustainable."

We will not, therefore, discuss this point at length or go into the question further than to refer to the following cases supporting this proposition:

Hellman vs. Goldstone, 161 Fed. Rep., 913;
Friend vs. Talcott, 228 U. S., 27;
In re Rhutassel, 96 Fed. Rep., 597;
In re Tinker, 99 Fed. Rep., 79;
In re McCarthy, 111 Fed., 151;
In re Thomas, 92 Fed. Rep., 912;
Saunters vs. Huntington, 166 Mass., 96;

and, further, to be availed of as a defence, such discharge must be pleaded in the action on the debt:

Consolidated Rubber Tire Co. vs. Vehicle Equipment Co., 121 App. Div., 764; 19 Am. B. R., 862.

In re Hellman vs. Goldstone, 161 Fed., 913, where injunction was refused, the Court said:

> "Presumably the Court in which such discharge is thus pleaded will accord it due legal effect, and if it does not the bankrupt's remedy lies in a review of such action by the proper

> Appellate Tribunal, or ultimately in the Federal Court for denial to him of a right under a law of the United States."

In *Friend vs. Talcott, supra,* the Court at page 41 said:

> "Nothing could more clearly emphasize the distinction which exists between the two subjects, that is, the granting of a general discharge, and the question after it is granted whether a particular debt is exempted by law from its operation—than does the provision of the statute (Sec. 14c, 30 Stat. 550), authorizing a general discharge as the result of an approval of a composition, since it expressly reserves from the operation of such discharge of the bankrupt from his debts 'those not affected by a discharge' ";

and at page 42, the Court said:

> "If on the other hand, it be conceded that the composition was rightfully approved, as the determination of that subject did not under the very terms of the statute involve passing upon the separate and distinct claim of creditors to be exempt from the operation of the discharge, it results that in no view of the case is there merit in the contention as to *res judicata.* The contentions urged in many forms based upon the recitals in the order of confirmation of the composition made conformable to the statute as to the absence of fraud or other wrongdoing, etc., is but a reiteration of the contention as to *res judicata* which we have shown to be without foundation."

See also Remington on Bk. (2nd Ed.) pp. 242-5, and cases cited.

In re McCarthy, 111 Fed., 151, the Court said:

> "The effect of such discharge if in the future it shall be pleaded in bar of the collection of the judgment in question will arise in the proper tribunal where such collection is sought to be enforced."

The power of District Courts of Bankruptcy to issue injunctions restraining actions against bankrupts is expressly limited by the Bankruptcy Act to a period "until after an adjudication or the dismissal of the petition, if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or if within that time such person applies for a discharge, then until the question of such discharge is determined."

Bankruptcy Act, Section 11.

Furthermore, it has been held that even during the period within which the bankruptcy court may enjoin proceedings it cannot do so where the action is in another state, but that such restraining order must be obtained by ancillary proceedings in the District Court in the jurisdiction where the action is pending.

See *Acme Harvester Co. vs. Beckman Lumber Co.*, 222 U. S., 301.

II.

The complaint does not state any facts which authorize or require the Court below to take jurisdiction of this suit as ancillary to any proceedings at any time heretofore had in said Court.

Petitioners contend that the proceedings had in the bankruptcy matter of S. H. P. Pell & Co. had the effect of discharging not only the bankrupts, Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, but also Robert M. Thompson, from all claims against the firm of S. H. P. Pell & Co. With respect to the claims of creditors of that firm who assented to the composition we think that was true. They would have a right to release said Thompson, and if they signed a paper intending to so release him it undoubtedly would do so whether that paper happened to be an offer of composition by certain bankrupts or any other form. But, it certainly could not release Thompson from claims of any creditor who did not assent to it; because Thompson was not one of the bankrupts, he did not make the offer of composition, and did not comply with the requirements of the Bankruptcy Act with respect to bankrupts offering composition. The offer was made by the bankrupts Pell, Kittle and Pell (pp. 28, 31). The Bankruptcy Act provides with reference to compositions, as follows:

> "A bankrupt may offer, either before or after adjudication, terms of composition to his creditors, but not before he has been examined in open court or at a meeting of his creditors,

and has filed in court the schedule of his property and lists of his creditors, required to be filed by bankrupts. In compositions before adjudication, the bankrupt shall file the required schedules, and thereupon the court shall call a meeting," etc. (Italics ours.)

Bankruptcy Law, Section 12.

But even if we were to assume, for the purpose of this argument, that said Thompson was to be considered in the same position as the bankrupts, and the offer were assumed to have the broadest possible power in discharging him from all his debts and from all the liability by reason of his connection with said firm of S. H. P. Pell & Co., what does that profit the plaintiffs here, for as we have seen the authorities all hold, their remedy in that event would not be to seek here to enjoin the prosecution of an action in some other Court on a debt claimed to be barred by such discharge or composition, but to set up the composition and discharge in the forum where the debt is sued upon.

The plaintiffs say that the proceedings relating to the composition and the decree confirming the composition had, in addition to all of its powers as a decree confirming a composition, certain further peculiar and extraordinary virtues which would result in preventing all persons from asserting in any proceedings the liability of Robert M. Thompson to creditors of the firm of S. H. P. Pell & Co. on account of any transactions with said firm on his liability as a general partner, although

he was not one of the bankrupts and had not offered the composition. We submit that this is not so for the following reasons:

(a) It was not intended to be such by the parties offering the composition and who were responsible for its confirmation, and the offer of composition shows on its face that it was not intended to be.

(b) Because it is not possible by even the most strained construction of the order confirming the composition, to convert it into such a decree.

(c) Because a Court of Bankruptcy is a Court of limited jurisdiction and has no powers outside of those necessary for the administration of the bankruptcy act; and there is no provision in the bankruptcy act which authorizes making of any such decree, and a Court will not be presumed to have made an order which would be *ultra vires*.

As to (a).

That the offer of composition was not intended to have any such effect as is now claimed for it is clearly shown by the language of the same (Exhibit 6 to the Complaint herein) which states in the first paragraph, as follows:

"First: This offer is made in consideration of the discharge of the bankrupts, Stephen

H. P. Pell, Charles A. Kittle and Howland H. Pell, from their debts, both individual and partnership, and of the *release of Robert M. Thompson from* any and all liability to said S. H. P. Pell & Co., and from any and *all liability to any creditor* of S. H. P. Pell & Co., WHO SHALL ASSENT HERETO, on account of any connection of said Robert M. Thompson with said firm or any transaction of said Robert M. Thompson by or through said firm" (italics ours).

It will be noted that this provides for the discharge of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell from their debts, both individual and partnership, without further qualification, but as to Thompson it specifically seeks only release of liability from those "who shall assent hereto." There is no allegation anywhere in the complaint or anywhere else in the papers in this action, that the defendants herein assented to the composition. If they had, undoubtedly, they would have been bound. And, again, in paragraph Ninth of said offer, the following language is used:

"Ninth: Each and every creditor of S. H. P. Pell & Co., WHO SHALL ASSENT TO THIS OFFER of composition shall, upon the final confirmation of such composition by the Court, be deemed conclusively BY HIS SAID ASSENT THERETO to have released Robert M. Thompson of and from any and all liability to such creditor on account of any connection of said Robert M. Thompson with S. H. P. Pell & Co., or any transaction of said Robert M. Thompson by or through S. H. P. Pell & Co."

This clearly indicates that the parties proposing the composition at that time were not willing to risk asking the Court to enter an order which would be *ultra vires* and which might for that reason be afterwards declared void, so that they were careful to provide that any release which might be secured by Thompson in connection with the composition proceedings should only apply to those who specifically assented thereto. Thompson was claiming to be a creditor of the bankrupts' estate in over $3,000,000 (Complaint, par. 12, p. 6), and he was seeking to get his claim adjusted by having the receivers deliver to him securities of immense value which they held (Ib., pp. 30, 39-41); and Thompson's acceptance of the composition offer was not made in consideration of any release by creditors, but in consideration of an order being obtained authorizing the turning over to him of such securities (see acceptance of Thompson, pp. 47-48); and that order was thereafter, entered (Complaint, Exhibit 8, p. 48).

The order confirming the composition (p. 49) provides:

> "It is Ordered, Adjudged and Decreed, that the said composition be and the same hereby is in all respects confirmed, and the said offer of composition dated December 21, 1914, with Exhibits 'A,' 'B,' 'C,' 'D' and 'E' annexed thereto, are hereby made a part of this decree."

The conditions contained in the offer are thereby carried into the decree.

It then goes on to provide for the appointment of the trustees and other administrative matters, and the only reference made in the decree to Thompson is where it confirms the settlement of his claim and the transfer of the stocks and bonds to him (p. 51) and then provides:

> "and upon the said Robert M. Thompson executing and delivering to the receivers a release of any and all claims which he may have against the bankrupts, against the receivers thereof, and the estates of S. H. P. Pell & Company and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, and in all respects complying with the terms of the offer of composition on his part to be performed, and thereupon the said Robert M. Thompson *shall be relieved of* any *further liability to the said receivers or to the estate* by reason of the order heretofore entered by this Court dated January 6, 1915, or otherwise" (italics ours).

It will be noted that any attempt to release said Thompson from liability to *creditors* was very carefully avoided.

It will also be noted that both in the offer of composition and in the order confirming the same, any reference to the question of whether Thompson was a general or special partner was carefully avoided. So that there was no adjudication of that question there.

As to (b).

We submit that a reading of the order shows that it does nothing more than confirm a composition offered by certain bankrupts, authorizes the receivers to make settlement with one claiming to be a creditor (Thompson), and dismisses two intervening petitions by consent. It does not attempt to adjudicate the question of Thompson's partnership status.

We have seen that the order did not attempt by its provisions to discharge said Thompson from any liability to creditors. If it had, it would still be nothing more than a discharge in bankruptcy or an ordinary order confirming a composition, assuming that he had been one of the adjudicated bankrupts; and, that being so, the District Court would not attempt to interfere in an action brought on a debt which might be discharged by that order, as we have stated in Point I above, and which we understand is not seriously disputed. But the order cannot amount to even that as we have seen (*supra*, p. 14).

As to (c).

It is alleged in the complaint that the composition was

> "pursuant to the provisions of the Bankruptcy Act in such case made and provided" (p. 6).

However, if the order had purported to be more than a discharge or an order confirming a composition, then it would have been clearly *ultra vires;* and it will not be so construed, but the Bankruptcy Court will be presumed to have been acting within its jurisdiction. The Court of Bankruptcy is a court of limited jurisdiction, COLLIER on Bankruptcy (11th Edition, page 27) says:

> "The origin of Courts of Bankruptcy is statutory, and they have no powers or jurisdiction other than is conferred upon them by, or necessarily implied from, the statute."

We submit that one will search vainly in the bankruptcy act for any provision authorizing any proceeding in the nature of a bill of peace or conferring upon a Bankruptcy Court power to enter such equity decrees.

In *Bardes vs. Hawarden,* 178 U. S., 524, the Court, at p. 535, said:

> "The section nowhere mentions civil actions at law, or plenary suits in equity and no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of the incidental powers."

While a Bankruptcy Court has sufficient equity powers to enable it to properly administer the Bankruptcy Act, its powers are limited to the administration of that act, and it has no power to enter a decree barring claims except as that might be done by a discharge or an order confirming a

composition, or as it may be done upon the foreclosure of liens in the course of the administration of the estate.

In re Frear, 120 Fed. R., 973, Judge RAY said (pp. 927-80):

> "The parties and referee have adopted a mode of composition and procedure utterly at variance with the law, and now ask the Court to approve and confirm it. The proceeding adopted and followed is not sanctioned by the law, and neither the Court nor the Judge has power to confirm it. * * * The statute was made to be observed and complied with, and only when there has been a substantial compliance therewith will the Judge or Court approve and confirm the proceedings";

and further quotes with approval from the opinion of Judge COXE *in re* Rider, 90 Fed. R., 808, as follows:

> "A law which compels a creditor, against his will to accept in discharge of his debt just what the debtor sees fit to offer, should be strictly construed."

See also

> *In re Lockwood,* 104 Fed. R., 794;
> *In re Northampton, etc.,* 185 Fed. R., 542;
> *In re Fairlamb,* 199 Fed. R., 278.

A reference to the authorities shows that the only instances in which the District Court has assumed ancillary jurisdiction in connection with

bankruptcy proceedings is where the question of title to property has been involved such as where liens have been claimed by receivers or trustees upon property and the Court has determined the question of title either by foreclosure or otherwise, and attempts were afterwards made in other courts to deprive the purchaser of such property of the same by seizing the same on claims against the bankrupt. A careful search of the cases has failed to reveal any other grounds upon which any United States District Court has taken jurisdiction ancillary to bankruptcy proceedings. We submit that it cannot be seriously contended that the action here sought to be enjoined is an attempt to seize property from one in whom the District Court has vested title. On the contrary, the action in South Carolina is against the very members of the bankrupt firm and what is asked for there is a personal judgment against those individuals. If the bankruptcy proceedings are a bar to a recovery in that action, they have a perfectly adequate remedy at law by setting up the discharge in bankruptcy in answer to that action. The plaintiffs may say that said Thompson was claiming title to various securities which the receivers also claimed, and by an arrangement between said Thompson and the receivers which was confirmed by order of this Court, the title to those securities was vested in Thompson. But, even if we assume that all that is true, it does not avail the plaintiffs here, because even by the farthest stretch of the imagination the action sought to be enjoined cannot be converted into an attempt to seize property as to which the title has been vested in Thompson. It is alleged

in the complaint in said action in South Carolina (Exhibit 11, to Complaint here, p. 54), that said Thompson was a partner in said firm of S. H. P. Pell & Co.; and it is to recover against him on his liability as such partner as well as the other members of said firm that the action is brought.

The case of *In re Swofford,* 180 Fed., 549, is one of the leading cases on the question of jurisdiction ancillary to bankruptcy proceedings relied on by plaintiffs. But, that case is entirely different from the case at Bar. In the Swofford case a corporation was the bankrupt. It had a claim against Swofford which was passed to the trustee and was by him sold and transferred to Swofford. A stockholder afterwards brought a suit for accounting against the corporation and Swofford with respect to the same claim. The Court said:

> "We have seen that a proceeding in bankruptcy is a proceeding in equity, and that for the purposes of enforcing and protecting its jurisdiction a Court of Bankruptcy has all the inherent powers of a Court of Equity. This being the case, it may be appealed to by supplementary and ancillary bill to enforce its orders, sustain its jurisdiction, and protect parties before it in the enjoyment of rights secured through and under it, and this is always true where jurisdiction is reserved or still retained, and even afterwards *where the result would be a relitigation of the same subject matter between the same parties.*" (Italics ours.)

We submit that there was no adjudication in the Pell bankruptcy proceeding of the subject matter

involved in the South Carolina action or any other matter *between these parties.*

The defendants here were in no sense parties to any proceeding in the Pell bankruptcy matter, and cannot be bound by anything that transpired there except in so far as all creditors may be bound by the discharge.

In *Gratoit County State Bank vs. Johnson,* 249 U. S., 246, this Court said:

> "The trustee contends, however, that since by §§18b and 59f of the Bankruptcy Act, any creditor is entitled to intervene in the bankruptcy proceedings, the bank should be considered a party thereto. These sections are permissive, not mandatory. They give to a creditor who fears, that he will be prejudiced by an adjudication of bankruptcy, the right to contest the petition. Whether he does so or not, he will be bound, like the rest of the world, by the judgment, so far as it is strictly an adjudication of bankruptcy. But he is under no obligation to intervene, and the existence of the right is not equivalent to actual intervention. Unless he exercises the right to become a party, he remains a stranger to the litigation, and, as such, unaffected by the decision of even essential subsidiary issues. *Re McCrum,* 130 C. C. A., 555, 214 Fed., 207, 213; *Cullinane vs. Bank,* 123 Iowa, 340, 342. The rule is general that persons who might have made themselves parties to a litigation between strangers, but did not, are not bound by the judgment. Compare *Western U. Teleg. Co. vs. Foster,* 247 U. S., 105, 115, 62 L. ed., 1006, 1016, P. U. R., 1918D, 865, 38 Sup. Ct. Rep., 438. No good reason exists for making an exception in the case of bankruptcy proceedings.

> • • • Had the adjudication been made determinative also of claims of the several creditors against the estate, or of claims of the estate, against individual creditors, such expedition in proceedings would be impossible, if each of the many widely scattered creditors is to be afforded a fair opportunity to be heard. Furthermore, to require every creditor to acquaint himself with the issues raised in every proceeding in bankruptcy against his debtors, in order to determine where a decision on any such issue might conceivably affect his interests; and, if so, either to participate in the litigation, or, at his peril, suffer the decision of every question therein litigated to become *res judicata* as against him, would be an intolerable hardship upon creditors. And the resulting volume of litigation would often so delay the adjudication as to defeat the purposes of the Bankruptcy Act."

Even if they had appeared and opposed the composition, nevertheless they could not now be enjoined from suing on their debt in another court, the remedy would be to set the discharge up in bar.

Friend vs. Talcott, 228 U. S., 27.

In the case of *In re Ohio Copper Co.*, 241 Fed. R., 711, Judge MAYER at page 713, said:

> "In respect of the Madison Company, a rather interesting question is presented. That Company, upon its own motion, has obtained an order allowing it to intervene in the bankruptcy proceeding. It has submitted itself to the jurisdiction of the bankruptcy courts, and

there it must stay so far as concerns any attack by it upon the orders of the bankruptcy court.

* * * * * *

"It is the long settled and salutary practice of a court of equity to protect purchasers at sales held pursuant to its decrees, and a court of equity will not permit a party to institute in other courts and jurisdictions litigations which attack the title of the purchaser.

* * * * * *

"A court of bankruptcy may therefore accomplish by its order a result similar to that which could be accomplished by a court of equity under similar circumstances, *provided, of course, the person against whom the decree or order is directed was a party to the proceeding and had been served in personam.*"

There is no allegation in the complaint that defendants were parties to any proceeding which is claimed now as *res adjudicata.*

Defendants would not have been heard to object to the confirmation of the composition as their debt was not dischargable.

In re Serviss, 140 Fed. R., 222.

And Judge MAYER in the Ohio Copper case further says at page 712:

"In the case at bar it is highly inconsistent (to put the matter mildly) for the court to say to Heinze that he cannot intervene in the bankruptcy proceeding to attack such orders

of the court as he may be advised, and a moment later says that the court has power to compel him to remain in the proceeding from which the court has just excluded him."

The substance of what was held in *Riverdale Mills vs. Mfg. Co.,* 198 U. S., 188, will be found at page 195, where the Court said:

> "It may protect the title which it has decreed as against every one a party to the questions of right which have already been determined."

There is no more ground for ancillary jurisdiction here than there was in the following cases:

> *Stillman vs. Combe,* 197 U. S., 436;
> *Cook vs. Beacher,* 217 U. S., 497;
> *Central Trust Co. vs. Chicago, etc., R. Co.,* 224 Fed. R., 706.

In Stillman vs. Combe, *supra,* at page 448, the Court said:

> "We are somewhat at a loss to add anything to a statement of the case to show how utterly without foundation is the claim of jurisdiction over the bill as an ancillary suit. The bill does not seek either to disturb the judgment or to have anything done towards carrying it out. The judgment was satisfied, and the functions of the court in the former case were at an end when the land was recovered. * * * It may be that the judgment would not have been the same but for the agreement of some of the parties upon those matters. But the bill does not allege that it was obtained by fraud, and, as we have said, does not seek to set it aside."

III.

The plaintiffs have an adequate remedy at law; and therefore the Court below was right in dismissing the complaint.

Giving the bankruptcy proceedings the most favorable construction possible to plaintiffs, the result is nothing more than a discharge of all the plaintiffs from debts due creditors of Pell & Co.

The debt sued on in the South Carolina action as is shown by the complaint, Exhibit 11 to the complaint herein, was not one that was dischargable in bankruptcy, and, therefore, nothing occurring in the bankruptcy proceedings could result in a discharge.

But even if it were, that is a defense which will be accorded full faith and credit in the United States District Court for the Eastern District of South Carolina.

> "A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made."
>
> Bankruptcy Law, Sec. 21f.

An avoidance of a discharge is not a collateral attack upon the discharge.

> *Schiller vs. Weinstein*, 15 Am. B. R., 184;
> *Remington on Bk.*, Sec. 2443.

Moreover, not only is the remedy complete and adequate, but it is the more orderly and efficient way of asserting the benefit of a discharge.

IV.

As to the contentions set up in petitioners' petition and brief.

We shall not attempt to reply to each of appellant's points separately. We have covered the principal questions in our previous points and shall therefore only briefly reply here.

The appellant's brief contains citations to and quotations from a great mass of decisions which are mostly so obviously irrelevant that we shall not impose upon the Court's time by attempting to take them up one by one and distinguish them.

The contentions of appellants may be briefly summarized and replied to as follows:

Appellants contend, in substance:

First. That United States District Courts have ancillary jurisdiction to protect parties to their decrees.

Second. That Thompson was released as to any obligations to the Pell Receivers and estate.

Third. That Thompson was a special partner—was adjudicated to be and admitted to be.

AS TO THE FIRST CONTENTION.

Appellants say that the primary question involved is whether the United States District Court has ancillary jurisdiction (Appellants Br., p. 2), and they go on to say:

> "The Circuit Court of Appeals has now, in effect, determined as matter of law that the District Courts of the United States are without ancillary jurisdiction to protect the persons with whom in the course of proceedings in bankruptcy contracts are made under the direction of the bankruptcy court by its receivers in behalf of the estates represented by them in adjustment and final settlement of disputes between the receivers and creditors of the bankrupt estate on the one hand and, on the other hand, persons alleged to be debtors but claiming to be creditors of the bankrupts and to be entitled to a share in the distribution of their assets; and
>
> That such Courts are without power to entertain a bill to protect parties to such settlements against the vexatious reopening of such controversy so settled, or to consider the merits of a bill for such relief."

We are unable to understand this statement in view of the opinion of the Circuit Court of Appeals in which that Court states (p. 74):

> "We do not question but that the District Court for the Southern District of New York may enforce and protect its jurisdiction, as a Court of Bankruptcy when appealed to by a supplementary or ancillary bill to enforce its orders, sustain its jurisdiction and protect par-

> ties in the enjoyment of rights secured to them under its orders. This is so not only where jurisdiction is reserved or still retained but even afterwards where the result would be a relitigation of the same subject matter between the same parties."

Appellants say (their br. p. 3) the Trial Judge denied jurisdiction of the District Court to entertain the cause. The Trial Judge said (p. 66):

> "Similarly, I pass the question whether this bill is within the ancillary jurisdiction of a Court of Bankruptcy or of the District Court as ancillary to the Court of Bankruptcy."

Can this be the denial of jurisdiction? The Trial Judge did not consider it necessary to pass on the question of jurisdiction because:

> "Seeing no ground for equitable intervention, even if all be true that the plaintiffs allege, it follows that the bill is without equity, and as such it will be dismissed, with costs" (Rec., p. 68).

The Court of Appeals considered the merits and held in substance that the facts of this case do not warrant the exercise of any ancillary jurisdiction. It says:

> "The Court below found in the bill no ground for equitable intervention even if all the allegations the bill contains be assumed as true. We are in full agreement with that Court in believing that the bill is without equity."

That certainly sounds like a decision on the merits; and if, when all the allegations of the bill are assumed to be true, there is still no equity, what possible purpose could be served by having "a trial of the issues * * * proceeded with," except the purpose of delay which is apparently the whole purpose of the suit.

After misconstruing what the Trial Judge and the Circuit Court of Appeals say, appellants say:

> "We have thus a contrariety of judicial views in the cause as to whether the jurisdiction invoked exists" (Appellants' Brief, p. 4).

Whereas, a reference to what the judge who heard the preliminary motion, Trial Judge and Circuit Court of Appeals really said, show that all of the judges who discussed the matter were in perfect harmony and none of them denied the ancillary jurisdiction of District Courts to protect their decrees in proper cases.

While asserting that the question of jurisdiction is the primary one, appellants admit (their br., p. 4) that on certiorari the whole question is before the Court and that it is immaterial whether the jurisdiction exists or not if no equity is presented for its exercise.

The Courts below found that the bill of complaint was without equity and for that reason dismissed it (Rec., pp. 68, 76) and this Court having the whole matter before it will also examine the bill to determine whether it presents any equitable ground for intervention.

REPLYING TO THE SECOND CONTENTION.

The difficulty with petitioners' argument is that it does not appreciate the difference between a claim by the *firm* against Thompson as a *debtor* and a claim by a *creditor* against him as a *partner*.

We submit there is a great difference and while a claim of the *firm* or *estate* against a *debtor* may be compromised and released, the liability of a *partner* could only be released or discharged in accordance with the provisions of the bankruptcy act.

Petitioners lay great stress on the settlement made by Thompson with the receivers. An examination of the order on this settlement (p. 48) will show that it was simply to enable Thompson to regain possession of securities of immense value, upon his assuming the liens against the same; and it did not attempt to pass on the relation of Thompson to creditors who did not assent.

Petitioners' brief (page 26) says:

> "The proceedings in the cause discharged Thompson * * * from all liability to the firm and any one claiming under it."

But the defendants are not setting up any liability of Thompson to the firm and are not claiming under the firm. Their claim is against the firm and the individual partners.

After quoting from the opinion of the Court of Appeals, which discusses the condition that any release to Thompson should only be to such credi-

tors who should assent to the offer of composition, the petitioners' brief (pages 27-28) states:

> "The fallacy of this language of the opinion lies in its confinement of Thompson's appeal to the offer of composition to limit the terms of the decree * * *; the terms of the composition cannot possibly limit the express language of the decree."

and (at p. 54) they further say:

> "The release of Thompson by the Bankruptcy Court is unqualified by any reference to the offer of composition."

We do not believe plaintiffs' counsel intend to mislead the Court, but clearly they have not read the order they rely on, for it specifically says:

> "It is Ordered, Adjudged and Decreed that the said composition be and the same hereby is in all respects confirmed *and the said offer of composition* dated December 21, 1914 with Exhibits A, B, C, D and E annexed thereto are *hereby made a part of this decree.*" (Italics ours.)

Therefore the terms of the offer are expressly made a part of the order.

REPLYING TO THE THIRD CONTENTION.

Petitioners seem to think that there is some advantage in the point that the demurrer admits the allegation that Thompson is a special partner. They call attention to it at every possible point. In

fact, we would be justified in saying they "harp" upon it. We cannot grasp this point of view. First, we believe that the allegation referred to is a conclusion which would not be admitted by the demurrer. But, suppose it is admitted for the purposes of the demurrer, how can that avail these petitioners? That does not in any way conflict with our position in the South Carolina action. There Thompson is sought to be held equally liable with the general partners under the New York Law; but it is not alleged that he was not a special partner.

In the case of *Abendroth vs. Van Dolsen,* 131 U. S., 66, which was a case quite similar in facts to this, the Supreme Court, Mr. Justice LAMAR writing, said, at p. 70 (referring to special partner's liability as a general partner under the New York law):

> "The counsel for plaintiff in error * * * contends that the plaintiffs are estopped from setting up this liability by the proceedings in bankruptcy above recited, which he claims had the effect of an adjudication binding upon them that no such liability existed."

and at p. 72:

> "But even if, for the sake of argument, we concede that this last order of the Judge was in effect an adjudication that Abendroth was a special partner, there is nothing in the judgment of the Court below which denies its validity. The latter judgment also holds Abendroth to be a special partner, and as such

liable, under the statute, in the same manner that he would be if he were a general partner. This is shown in the opinion of the Court, which very properly holds that the statute, in fixing this liability on account of non-compliance with its provisions, does not change his special partnership into a general one, but simply makes him liable as a general partner to creditors. All his relations to his co-partners, and their obligations growing out of their relations to him as a special partner, remain unimpaired. If before the firm became bankrupt he had been, under his statutory liability, forced to pay a bill or note, or other general debt of the firm, he would have been entitled to indemnity from his partners, and could have recovered back from them the amount, with legal interest thereon. The view presented by the Court of Appeals of New York upon this point in the case of Durant vs. Abendroth, 97 New York, 132, 144, is clear and satisfactory."

and quotes from the New York case as follows:

"Notwithstanding the erroneous statement in the affidavit as to the payment of the capital, the partnership was, in form, a limited partnership, and subject to all the rules applicable to such partnerships. If it had undertaken to make an assignment with preferences, such assignment could not have been sustained on the ground of the violation of the statute. That violation could be taken advantage of only by creditors, and its consequence simply was to give them recourse against the special partner personally, as if he had been a general partner."

See also

Quotation from Friend vs. Talcott on p. 12 hereof.

Certainly, such an admission does not give any ground for an injunction. It is what happened in the bankruptcy proceedings that petitioners are trying to found jurisdiction on. Petitioners say in their brief (page 22) referring to Thompson "he was not adjudicated a bankrupt, but as a part of the settlement, the petitions to have him so adjudicated, were dismissed." Can it be possible that when one is alleged to be a bankrupt and such petitions are dismissed on consent, that such a dismissal can be a bar to creditors who were not parties. Certainly the bankrupt act does not provide any such method for obtaining a discharge.

Petitioners seem to think that their position is aided by the law of New York relating to special partners. The petitioners' argument is apparently based on an unfamiliarity with the law of New York on that subject, because even a casual examination will reveal that any liability existing against a special partner is in favor of creditors, and not the firm, that when a special partner pays in his contribution to the capital, there is no further liability to the firm, but that he may incur a liability to creditors the same as if he was a general partner (Partnership Law, Section 34). The said section reads as follows:

> "§34. If any false statement be made in any such certificate or affidavit, made either upon the formation or renewal or continuance or increase of capital of such partnership, or if any such certificate or notice is not so published, or if such partnership be renewed or continued in any other manner the persons interested therein *shall be liable as general partners.*"

This does not change him from a special partner to a general one in any other respect than as to liability to creditors.

AS TO PETITIONERS' POINT I.

The contention as to admissions by the demurrer we have already replied to. The case of *U. S. vs. Cal. & Or. Co.*, 192 U. S., 355 is cited with great confidence to sustain the contention that the dismissal of the intervening petitions against Thompson was a litigation of the partnership question. But, in that case it appears, at p. 356, as to the former action:

> "On March 29th, 1913, a final decree was entered, finding the facts to be as alleged by the Land Company, including the allegation that the Land Company was a *bona fide* purchaser for value, and dismissing the bill on that ground."

That would seem to have been a dismissal on the merits, whereas, the dismissal here was nothing more than a consent withdrawal by the intervening petitioners of petitions that alleged Thompson was a general partner, and containing no refence to his being a special partner and his liability as such under the express terms of the New York Partnership Law, Sec. 34.

Thompson's liability could not be determined in a composition proceeding under the Bankruptcy Act until he had filed schedules as required by Sec. 12 of that act. Besides the defendants here were

not parties to that proceeding, so that there can be no question of a relitigation of any question between these parties.

Moreover, an examination of the petitions filed against Thompson will show (Rec., pp.16, 19) that they allege that Thompson was and had been a general partner and make no mention of his statutory liability as a special partner. Therefore, if there could be said to be any adjudication as a result of dismissing the petitions on consent, it certainly would go no further than that he was not a general partner (see discussion as to liability of special partner, pages 35-37 hereof, and *Abendroth vs. Van Dolsen*, 131 U. S., 66).

As to Petitioners' Contention of a "Contract of the Court."

The order of January 6, 1915 was simply one permitting the receivers to dispose of certain securities held by them; and the decree of January 25, 1915, as we have seen did not and could not go further than the offer upon which it was based. Therefore there is no "contract of the Court" which is being attacked here.

Petitioners cite the case of *Abbott vs. Anderson*, 265 Ill., 285. We are unable to see that that case has any bearing on the question here. There a number of suits had been brought involving the same question, by persons who had been parties to the composition proceedings, and all the members of the bankrupt firm had offered the composition, which presumably was accepted by those creditors, as they withdrew objections previously made.

But, if it could be construed to be authority for petitioners' contentions, then we say it is contrary to the decision of this Court in *Abendroth vs. Van Dolsen, supra.*

As to the contention that the defendants are bound by the decree of January 25th and that for purposes of the present bill the proceeding in the bankruptcy must be treated as valid, we submit that no contrary contention has been made by the defendants. But as to how far it is binding on defendants we refer to *Gratoit Co. State Bk. vs. Johnson, supra.*

As to Petitioners' Point II.

Petitioners' Point II is in substance that the order of Jan. 25, 1915, confirming the composition finally discharged and released Thompson from claims of all creditors of Pell & Co. As we have seen, even if this were so it would not entitle appellants to an injunction, the remedy would be to set up the discharge as a plea in bar. But such a construction of the effect of the confirmation of the composition is contrary to the express language of the offer of composition which provided (paragraphs "first and ninth") that any release of said Thompson should only be as to creditors

"who shall assent hereto" (p. 28).
"who shall assent to this offer" (p. 29).

and, certainly the order confirming the composition did not pretend to change the terms of the composition as submitted to and accepted by the

creditors. On the contrary, it specifically makes the offer a part of the decree. The offer (par. "ninth") further provided that such assenting creditor should upon the final confirmation of such composition be deemed

> "by his said assent to have released Robert M. Thompson."

It will be noted that no such provision is made with respect to the release of the three bankrupts, and that no claim is made that defendants ever assented to said offer.

The offer containing these provisions was accepted by Thompson, so that he might regain possession of valuable securities which the receivers held (pp. 47-48).

Petitioners seem to attach importance to the use of the word "assent" instead of "accept" in the offer of composition. While some may find a technical distinction between the two words, in every day usage the words are used as synonyms and are stated to be such in the Century Dictionary, so that we are inclined to believe that the word "assent" was used in said offer in its ordinary meaning of "accept," "consent," "agree." If it were used with intent of expressing more than "accept" then, we say that it shows all the more clearly that no attempt was made to release Thompson as to all his creditors; because "assent" technically defined is

intended to convey action of the mind in agreement or approval, and is evidenced by acceptance.

> "An assent is evidenced by a proposition emanating from one side and acceptance of it on the other."

Fulton vs. Kemp, 16 N. Y. S., 158, 160.

See also,

Lemp Brewing Co. vs. Secor, 96 Pac. R., 636, 639.
Webster vs. Brassfield, 67 Mo., 331.
Norton vs. Davis, 83 Tex., 32.

To constitute an "assent" the proposition must be fully known to and understood by the party assenting.

Words & Phrases, Vol. I, pp. 545-6.

There, therefore, could not be an assent to the release of a claim which was not known to exist, certainly not without some definite affirmative act.

To construe this word as petitioners seek to do would be to change the language to read "who shall not object hereto."

We do not understand the statement at the end of Petitioners' Point II that it is not alleged that Thompson had personal knowledge of the alleged fraud. The allegation is (p. 55):

> "And that defendants at all times knew that said alleged purchases and sales had not been

made and that the said notices, statements, reports, representations and statements of account made and rendered by defendants to plaintiffs as aforesaid were false and fraudulent at the times they were severally made."

Thompson is one of the defendants referred to in said allegation (p. 54).

AS TO PETITIONERS' POINT III.

This point is in substance a restatement of contentions made in the previous points which we have already replied to.

This point shows the utter confusion in the minds of petitioners and their inability to grasp the true situation here: viz., that the action in South Carolina is not an attempt to enforce any liability of Thompson as a debtor to the firm or estate of Pell & Co., but an individual liability, asserted against him and the other members of said firm as partners. If this debt sued on was a dischargable debt then the discharge in bankruptcy undoubtedly will be a bar as to any or all of the partners discharged.

For an illustration suppose, as in the Swofford case, so much relied upon by appellants, a corporation becomes bankrupt and a question arises as to the liability of one of its officers as a debtor to the estate. Upon that liability being compromised and settled by order of the Court no one can afterwards sue that officer-debtor on that debt in behalf of the corporation or its bankrupt estate; but suppose a creditor were to sue that officer-debtor not as an officer of the corporation, and not on his al-

leged debt to the corporation, but as an individual, claiming that there had never been any corporation but that the business was in reality a partnership, and that the officer was a partner and liable as such to the suing creditor for the full amount of the creditor's claim, would that partner, because he had in the guise of debtor paid certain money in settlement of an alleged debt, into the estate, be permitted to escape his general liability as a partner by setting up his release as a debtor?

Here Thompson made a settlement of his claim as a creditor and received securities of great value. There is no attempt now to litigate any liability of Thompson as a debtor to Pell & Co.

Moreover, no question has ever been litigated between Thompson and these defendants, therefore there can be no relitigation.

It is said on page 58 that McCabe's firm "induced Thompson's action by posing as a debtor." It is difficult to see how one has been defrauded and does not know of the fraud (pp. 35-56) and who has been falsely scheduled as a debtor, can be said to be "posing" as a debtor.

Petitioners (their brief, pp. 16, 18) say that Thompson's position is one that should appeal to the conscience of a chancellor. Let us see what his position is. His position is that in order to secure the return of collateral of great value he agreed to pay the charges against the same. That instead of being adjudicated a bankrupt and having his property distributed to his creditors, he actually got several millions of property and now seeks to hide behind the order which enabled him to make such

recovery and asks the Court to enjoin his creditors from suing him. A fine appeal to the conscience of a court of equity.

There is no foundation for the contention that proceedings in this matter are in the nature of a bill of peace; and no attack is made in the South Carolina action upon any title established in the Bankruptcy Court.

The error in the plaintiffs' argument is that it assumes that the District Court for the Eastern District of South Carolina will not give full faith and credit to any discharge or decree that may have been granted by the District Court for the Southern District of New York, whereas, we must assume that the South Carolina Court will comply with the provisions of the Bankruptcy Act quoted *supra* (p. 29).

Reduced to a final conclusion, appellants' argument is that as a result of the bankruptcy proceeding, Thompson as well as the other partners, was discharged. If we assume for the purpose of this argument that this is so, then since the South Carolina Court is required by the statute to give such a decree full faith and credit, the plaintiffs have a perfectly adequate remedy at law and should avail themselves of it by setting up the discharge in the Court where the action on the debt is pending.

The avoidance of a discharge in bankruptcy is not a collateral attack upon the discharge (*supra*, p. 29).

V.

It is respectfully submitted that the decrees below should be affirmed.

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